SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 338

CONRAD WOLFLE, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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United States District Court, Western District of Washington, Northern Division.
November Term, 1930.

No. 41,369.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CONRAD WOLFLE,
Defendant.

INDICTMENT.

United States of America,
Western District of Washington,
Northern Division.—ss. Vio. Section 215 P. C.

The grand jurors of the United States of America being duly selected, impaneled, sworn, and

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*Page numbering appearing at the foot of page of original certified Transcript of Record.

charged to inquire within and for the Northern Division of the Western District of Washington, upon their oaths present: [2]

COUNT I.

That heretofore and prior to the first day of January, in the year of our Lord, one thousand nine hundred twenty-nine, Conrad Wolfle, hereinafter referred to as the defendant, had devised and intended to devise a scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises from Joseph P. Trecker, George H. Kimball, Hugh Jones, P. A. Heney, Dr. William C. Keyes, John S. Dreibellis, and divers other persons whose names are to the grand jurors unknown, all hereinafter in this indictment called investors, which scheme and artifice was in substance and effect as follows, to wit:

The said defendant was to organize and cause to be organized a corporation under the laws of the Territory of Alaska to be known as the Cantu Mining Company, and was to control, manage and operate the said Company and to use the funds thereof without regard to the interest of the said investors and was to sell the shares of stock of the said company through and by means of newspaper and circular advertising and personal correspondence and by personal solicitation of said defendant and his agents. The said defendant was to induce and attempt to induce the said investors to pur-

chase stock of the said Cantu Mining Company by exaggerated, misleading, false and fraudulent representations, pretenses and promises as to the value and prospects of the alleged Cantu mine, as to the efforts required to obtain the property by the said defendant Conrad Wolfle, and the price the said defendant had paid therefor, as to the title under which the property was held by the said company, as to operations alleged to be in progress thereon and ore [3] mined and shipped therefrom, as to additional properties and equipment acquired for operations thereon, as to the qualifications and experience of the said defendant as a mining engineer and mine operator and his previous record in such enterprises and as to the safety, the great prospects of profit from and consequent desirability of an investment in the stock of said Cantu Mining Company, which said pretenses, representations and promises were in substance and effect as follows, to wit:

1. That the said Cantu Mining Company owned twenty mining claims on Cantu Mountain, near Hyder, Alaska, free and clear of all encumbrances, whereas in truth and in fact as the said defendant then and there well knew, the said property had been sold at foreclosure sale to satisfy labor liens and claims of large amounts filed thereon prior to the purchase by the said Cantu Mining Company or by the said defendant, and the said Cantu Mining Company owned and held only an equity of redemption therein.

2. That Conrad Wolfle and associates had purchased the said mining claims for Two Hundred Fifty Thousand ($250,000) Dollars; that a year prior to the said purchase, the said Conrad Wolfle had made an investigation of the said property for a group of Spokane, Washington, men and after such examination had himself offered the owners One Hundred Fifty Thousand ($150,000) Dollars therefor, which offer had been refused, and that thereafter the said Conrad Wolfle and associates had joined in the enterprise of purchasing the said property at the said price of Two Hundred Fifty Thousand ($250,000) Dollars and had organized the said Cantu Mining Company on the basis thereof; whereas, in truth and in fact, as the said defendant then and there well [4] knew, the said defendant and associates had not paid Two Hundred Fifty Thousand ($250,000) Dollars for the said mining property but had paid and had contracted to pay only the sum of Thirty-two Hundred ($3200) Dollars.

3. That the said Cantu mine was in operation; that considerable ore had already been shipped to the smelter from which smelter returns were expected, aggregating from Twenty-five Thousand ($25,000) Dollars to Thirty Thousand ($30,000) Dollars; that considerable quantities of ore had been sacked ready for shipment; that a number of shipments would be made during the summer of 1929; that a tunnel was being driven on one of the cross-fissure veins, and that about one hundred

thousand (100,000) tons of ore had been blocked out; whereas, in truth and in fact, as the said defendant well knew, the said mine was not in operation; the said company had not a single employee at work thereon and did not have possession of the property; no ore had been shipped by the said company and no smelter returns of Twenty-five Thousand ($25,000) Dollars to Thirty Thousand ($30,000) Dollars, nor any other sum, were expected therefrom; no ore had been sacked by the company ready for shipment and there would be no shipments of ore during the summer of 1929; no tunnel was being driven on a cross-fissure vein or otherwise, and no ore was blocked out, but all the said representations were false and fraudulent and were to be made and were made only for the purpose of deceiving the said investors into parting with their money and property in exchange for stock of said company.

4. That shortly prior to September 8, 1929, another large ore body had been discovered, that is to say, a large porphyry quartz dyke carrying good gold values which would be a tremendously large ore body when developed, and [5] more valuable than anything theretofore discovered on the property; whereas, in truth and in fact, as said defendant then and there well knew, no such new ore dyke or vein had been discovered and the said representation was to be made and telegraphed from Alaska to the stock sales office of the said Cantu Mining Company at Seattle, Washington, only for

the purpose of inciting greater activity among the stock sales agents and to entice the said investors more readily to purchase the stock of the said company.

5. That the said Cantu Mining Company had contracted for a large plant of machinery, engine, compressor, electric light plant, ore cars, air pipe, rails, trackage and a small portable sawmill and all other machinery necessary to develop the said Cantu mine as cheaply and economically as possible; whereas, in truth and in fact, as the said defendant then and there well knew, no such machinery and equipment had been contracted for and none would thereafter be contracted for or purchased.

6. That the said defendant had obtained for the said Cantu Mining Company a five-year lease on the "Riverside Group" (meaning the property of the Riverside mine, near Hyder, Alaska), the 100-ton mill and all equipment thereon; that this immediately gave the Cantu Mining Company a mill so that operations could start as soon as weather conditions permitted, on low grade as well as high grade ore; whereas, in truth and in fact, as the said defendant then and there well knew, no such lease had been made nor would be made; the mill referred to was not of one hundred tons per day capacity but only a 50-ton mill and even if acquired, the said mill would by no means have enabled the said Cantu Mining Company to operate its property. [6]

7. That the management of the Cantu Mining Company was of the highest responsibility, that the officers and directors were business men of high character, business experience and standing; that women investors could place their full confidence in these men "without fear of loss or wild-catting" and know that every cent received from stock sales would be invested in the property itself; whereas, in truth and in fact, as the said defendant then and there well knew, the management of the said company, being in the hands of the said defendant, was irresponsible and unreliable; neither women or other investors could rely on the officers and directors to protect their investments and every cent received from stock sales would not be invested in the property but the larger proportion thereof would be consumed in selling expenses and would be appropriated by the said defendant for his own use and benefit.

8. That shortly prior to August 22, 1929, one of the biggest mining companies in the country had offered one dollar ($1) a share for all outstanding stock of the Cantu Mining Company; that a few days later the same company had offered One Million ($1,000,000) Dollars for the Cantu property; that both of these offers had been rejected and that the said offering company was considering the purchase of one hundred thousand (100,000) shares of the treasury stock of the said Cantu Mining Company; that regardless of whether or not any such big deal was made, the said Cantu stock would

go up to one dollar ($1) a share very shortly thereafter; whereas, in truth and in fact, as the said defendant then and there well knew, no such offers had been made by any bona fide mining company, and the said representations were to be and were made by the said defendant [7] only for the purpose of enticing and deceiving said investors; the condition of the said Cantu Mining Company did not warrant its stock going up to one dollar ($1) a share and there was no prospect of such advance.

9. That an investment in said Cantu Mining Company was a mining investment from which the usual hazards had been eliminated; that Cantu was an operating mine and not a prospect; that men and women of small means were the people above all others who should make investments in mines, that is, particularly deserving people of small means who wished to invest in Cantu stock with assurance against loss of principal; that the said defendant would guarantee to return their money with ten per cent interest at the end of [8] a year if the said investors should not then be satisfied; whereas, in truth and in fact, as the said defendant then and there well knew, the usual hazards of mining investments had not been eliminated from the said Cantu Mining Company stock, but on the contrary were greater than usual; the said Cantu Company's property was not an operating mine but only a doubtful prospect in which people of small means would be very unwise to invest, and the assurances and guaranties by the said defendant for the repay-

ment of money invested in the said company would be and were utterly worthless.

And the grand jurors further present and say that all of the aforesaid pretenses, representations and promises would be and were false and untrue and were to be and were made by the said defendant for the purpose of enticing and deceiving the said investors into paying over and delivering to him, the said defendant, their money and property in payment for stock of the said Cantu Mining Company, which said stock was then and there of much smaller value than the price to be paid by the said investors therefor, and the said defendant would and did defraud the said investors.

It was a further part of the said scheme and artifice that the said defendant would and did take for himself large blocks of the stock of the said Cantu Mining Company as promotion stock in alleged payment for properties conveyed by him to the said company and for alleged services and other considerations of small value and that the said defendant would and did sell and endeavor to sell all or large portions of said promotion stock held by him to the said investors, pretending and representing that the money paid by the said investors therefor would go to the treasury of the company and the development of said mining property; whereas, in truth and in fact, as the said defendant then and there well knew, the money received from such promotion stock was to be and was retained

by him for his own use and benefit; and as a further part of said scheme and artifice, the said defendant would and did neglect and fail to keep adequate and accurate books of accounts and records of receipts and disbursements of money collected from said investors on sales of stock of said company, and so planned and schemed to escape accounting to the said company and to the said investors for money improperly retained by him and appropriated to his own use and benefit.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That the said defendant, so having devised, and intending to devise, the aforesaid scheme and artifice, for the purpose of executing the same, and attempting so to do, on, to wit, the eighteenth day of September, in the year of our Lord, one thousand nine hundred twenty-nine, did knowingly, wilfully, unlawfully and feloniously place and cause to be placed in the United States Post Office at Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this Court, to be sent and delivered by the Post Office establishment of the United States, a certain letter, in an envelope with postage thereon duly prepaid, then and there addressed to

Mr. Joseph P. Trecker,
1200 Yew Street,
Bellingham,
Washington [9]

which said letter was then and there in words and figures as follows, to wit:

"Northern Life Tower
12th Floor
Tel. Se. 0984

Financing, Developing and Managing of Mining Properties

Conrad Wolfle
Incorporated

Seattle, Washington
September 18th, 1929

Mr. Joseph Trecker,
1200 Yew Street,
Bellingham,
Washington.

My dear Sir:

Mr. Oppelt tells me that you have been very unfortunate in your past investments; that you were a man up in years and could not afford to lose any more money, as your earning capacity was extremely limited.

I can readily understand how you feel, Mr. Trecker, and I don't blame you in the least for taking that attitude. There are so many different investments being offered to the public, that it is hard for one to decide which is the best. If you had been that particular in the past, you would have money now.

My business is mining. I have devoted the greater part of my life to this endeavor. I don't mean to appear egotistical, but I won't take a back seat for any man in my line. I have made lots of money for my friends as well as for myself, in mining. I know mining from a practical as well as a technical standpoint. I have received large "fees" as a Mining Engineer for examining a great many properties in the United States and Canada, and Alaska, and I know a Mine when I see one. I've put my own money in Cantu Mine as well as induced my closest friends to do so. From every conceivable standpoint, I have never seen a better property than Cantu.

Mr. Oppelt stated that you want to make money, and would like a yearly income as well as to have your principal secure, and to increase it in value. He said you would make one more investment if you were assured against the loss of your principal.

Mr. Trecker, it is not necessary for me to do this, but I will in your case: (I want this to be strictly confidential.) I could not, nor would I, do this for all our stockholders, but I have made this proposition to a couple of other deserving people so that they may enjoy better things in life, and I will do the same for you. [10]

If you care to invest $1000.00 in Cantu Mining Company stock with me, at 50¢ per share,

which will give you 2000 shares of the Corporation Capital Stock, and are not satisfied with the returns on your investment at the end of a year, I personally will refund your money and pay you 10% interest for the use of your money.

Within a very short time the price of Cantu Stock will advance to $1.00 per share. I trust that you will take advantage of the present 50¢ offer.

Yours very truly,

O-W-S (Signed) CONRAD WOLFLE"

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

COUNT II.

That the said defendant, Conrad Wolfle, so having devised and intended to devise the scheme and artifice described in the first count of this indictment, the allegations concerning which scheme and artifice in said first count being by reference thereto incorporated herein and made a part of this second count as fully as if here repeated, for the purpose of executing the said scheme and artifice and attempting so to do, did knowingly, wilfully, unlawfully and feloniously, on or about the fifteenth day of August, in the year of our Lord, one thousand nine hundred twenty-nine, place and cause to

be placed in the United States Post Office at Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this Court, to be sent and delivered by the Post Office establishment of the United States, a certain letter, in an envelope, with postage thereon duly prepaid, then and there addressed and directed to

Mr. Geo. H. Kimball,
515 Melrose No.,
Seattle, Washington

which said letter was then and there in words and figures as follows, to wit:

"Northern Life Tower
12th Floor
Tel. Se. 0984

Financing, Developing
and Managing of
Mining Properties

Conrad Wolfle
Incorporated

Seattle, Washington
August 15, 1929

Mr. Geo. H. Kimball,
515 Melrose No.,
Seattle, Washington.

Dear Sir: [11]

Regarding the Cantu Mine at Hyder, Alaska, I will give you further information in addition to what you already know.

First: The property has exceptional merits, and has the greatest ore-showing of any Mine I ever knew,—and I know mining—not only the promotional end of it, but still more about the engineering and operating of properties.

Second: Cantu will be the first to ship high-grade ore out of Texas Creek, Portland Canal. We did ship some ore, and in 60 days from now we will have received smelter returns, which will probably be $25,000 or $30,000. I can assure you that Cantu will be shipping steadily all the year round, barring accidents. I fully believe that if there is no delay in the development of the Mine, and nothing comes up over which we have no control, Cantu will pay at least 50¢ a share dividends to its stock-holders. Because Cantu has such a low capitalization, I can guarantee these facts to you, and if the Mine does not pay, I stand ready to pay you your money back with 10% interest.

If Cantu does not make one of the greatest Mines that has ever been developed, then I do not know my business,—and I have brought out in the past four big winners. I neither give nor take odds from any man when it comes to mining and the mining business. I am not a stock salesman, but I do claim to be a successful Mine operator and Engineer.

When history is written, Cantu will have been a large dividend-paying Mine, and our great-grandchildren will be talking about the famous Cantu.

Yours very truly,

— (Signed) CONRAD WOLFLE."

CW:S

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

COUNT III.

That the said defendant, Conrad Wolfle, so having devised and intending to devise the scheme and artifice described in the first count of this indictment, the allegations concerning which scheme and artifice in said first count being by reference thereto incorporated herein and made a part of this third count as fully as if here repeated, for the purpose of executing the said scheme and artifice, and attempting so to do, did knowingly, wilfully, unlawfully and feloniously, on or about the twelfth day of September, in the year of our Lord, one thousand nine hundred twenty-nine, place and cause to be placed [12] in the United States Post Office at Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this Court, to be sent and delivered by the Post Office establishment of the United States, a certain letter in an envelope with postage thereon duly prepaid, then and there addressed to

Mr. J. P. Trecker,
1200 Yew Street,
Bellingham,
Washington.

which said letter then and there consisted of seven pages, being partly typewritten and partly in print, the letterhead, address and first two paragraphs being as follows:

"Northern Life Tower
12th floor
Tel. Se. 0984

Financing, Developing and Managing of Mining Properties

Conrad Wolfle
Incorporated
Seattle, Washington,
September the twelfth, 1929

Mr. J. P. Trecker,
1200 Yew St.,
Bellingham,
Washington.

Dear Sir:

In this day of gigantic mergers and consolidations of every conceivable kind and nature, we all know that the number of enterprises in our country are being reduced, and business as a whole is conducted differently. This affects the stock market, causing untold losses. No one knows what will happen to their investments. Every one wants to make money and protect the investments they have already made. Speculation never has equalled the present era.

Because of this condition I am writing you and enclosing literature about our investment offering. I am confident no other issue surpasses it."

the second, third and fourth pages being printed advertising matter of the said Cantu Mining Company, and the fifth, sixth and seventh pages again being in typewriting, the final paragraph reading as follows:

"Cantu Mine will make mining history. Several large mining Companies believe this to be a fact. Stockholders of this Company are to be congratulated on their excellent judgment.

Very truly yours,

O-CW-S Enc. (Signed) CONRAD WOLFLE."

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America. [13]

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

COUNT IV.

That the said defendant, Conrad Wolfle, so having devised and intended to devise the scheme and artifice described in the first count of this indictment, the allegations concerning which scheme and artifice in said first count being by reference thereto incorporated herein and made a part of this fourth count as fully as if here repeated, for the purpose of executing the said scheme and artifice and attempting so to do, did knowingly, wilfully, unlawfully and feloniously, on or about the twenty-seventh day of November, in the year of our Lord, one thousand nine hundred twenty-nine, place and cause to be placed in the United States Post Office

at Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this Court, to be sent and delivered by the Post Office establishment of the United States, a certain letter, in an envelope, with postage thereon duly prepaid, then and there addressed and directed to

Mr. P. A. Heney,
Seaboard Building,
Seattle,
Washington.

which said letter was then and there in words and figures as follows, to wit:

"Northern Life Tower
12th floor
Tel. Se. 0984

Financing, Developing and Managing of Mining Properties

Wolfle Engineering & Financing Corporation
Seattle

November 27th, 1929

Mr. P. A. Heney,
Seaboard Building,
Seattle.

Dear Mr. Heney:

As you already know, I just recently returned from Alaska. In order that you may go over more at your leisure the things which I told you, I am herewith giving you in detail a statement of the big piece of business which I was able to bring to a close while up in Alaska this time:

We have purchased the Silver Bell Group of Five claims, on the West Fork of Texas Creek. I have been after this property for more than a year. It is considered by everyone who knows the property, the most promising one on Texas Creek, next to Cantu itself. [14]

We feel that this a wonderful asset to our Corporation. There is a great amount of high-grade shipping ore, and as the government Highway will be completed to the property by next summer, shipment of high-grade ore will commence at once. The property will more than pay for itself from the very beginning. No money will be required by the Corporation to develop this mine. If it had not been located in a place where it was inaccessible, that property would long ago have been developed into a paying mine.

In addition to the Silver Bell property, we have also taken a five-year lease on the Riverside Group, including their 100-ton mill and all equipment. This is to be paid out on a 15% royalty,—no cash obligation required. The purchase price is $120,000, to be paid at the end of five years if we should decide to keep the property and all equipment.

This immediately gives the Cantu a Mill, and it puts us in a very good position financially. Most of the Mining Companies find themselves in the predicament after a mine is

developed, of needing additional funds to build a mill. In other words, we can start operating as soon as weather conditions permit, on our low-grade as well as high-grade ore.

We have also acquired a small parcel of ground which is well covered with heavy timber. This lies at the fork of Texas Creek highway and our own road. There are two large buildings on this property, a big pile of lumber,—mostly ship-lap,—a great deal of equipment, boarding-house, black-smith tools, sleighs, wagons, pack saddles, beds and bedding,—and other articles too numerous to mention.

We have all this for One Thousand ($1000) Dollars cash. This equipment we need for our Silver Bell property. The way it stands now, the Cantu Mining Company, in my judgment, will in the near future become one of the outstanding mining properties in Southeastern Alaska, and, in my judgment, all gambles are eliminated. The money invested in the Cantu may be considered a safe investment with large returns in the very near future.

Yours very truly,

(Signed) CONRAD WOLFLE

CW:S Managing Director,

Cantu Mining Company."

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present: [15]

COUNT V.

That the said defendant, Conrad Wolfe, so having devised and intended to devise the scheme and artifice described in the first count of this indictment, the allegations concerning which scheme and artifice in said first count being by reference thereto incorporated herein and made a part of this fifth count as fully as if here repeated, for the purpose of executing the said scheme and artifice and attempting so to do, did knowingly, wilfully, unlawfully and feloniously, on or about the thirteenth day of June, in the year of our Lord, one thousand nine hundred twenty-nine, place and cause to be placed in the United States Post Office at Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this Court, to be sent and delivered by the Post Office establishment of the United States, a certain letter, in an envelope, with postage thereon duly prepaid, then and there addressed and directed to

Mr. John S. Dreibellis,
6102 So. Thompson Street,
Tacoma, Washington

which said letter was then and there in words and figures as follows, to wit:

"Northern Life Tower
12th floor
Tel. Se. 0984

Financing Developing
and Managing of
Mining Properties

Conrad Wolfle
Incorporated
Seattle, Washington

June 13th, 1929

Mr. John S. Dreibellis,
6102 So. Thompson Street,
Tacoma,
Washington.

Dear Sir:

I was indeed glad when Mr. Koch brought in your order and the money for two Hundred (200) shares of stock in Cantu. It meant more to me than if some stock salesman or a business man had come in and bought Twenty thousand (20,000) shares.

When I met you over in the Tacoma Hotel the other day, I was satisfied that you had the right stuff in you. You are a young man who will make his mark in this world. You could not have taken hold of anything better, that would bring you more money and more joy, than Cantu Mining Company's stock.

And by fall, I know you will have enough money earned to finish your schooling. I assure you I am going to do all I can to [16] help you in closing any sales that you may work up. Do not hesitate to call on me when you have some prospective purchasers.

Do not forget that the Cantu is a rare jewel of a property that will rapidly develop into a large dividend-paying Mine.

Yours very truly,

CW:S (Signed) CONRAD WOLFLE"

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

COUNT VI.

That the said defendant, Conrad Wolfle, so having devised and intending to devise the scheme and artifice described in the first count of this indictment, the allegations concerning which scheme and artifice in said first count being by reference thereto incorporated herein and made a part of this sixth count as fully as if here repeated, for the purpose of executing the said scheme and artifice and attempting so to do, did, knowingly, wilfully, unlawfully and feloniously, on or about the thirtieth day of November, in the year of our Lord, one thousand nine hundred twenty-nine, cause to be placed in the United States Post Office at Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this Court, to be sent and delivered by the Post Office establishment of the United States, a certain letter and enclosure in an envelope with postage thereon

duly prepaid, then and there directed and addressed to

Dr. William C. Keyes,
Bellingham,
Washington

the said letter so enclosed in the said envelope being on the letterhead of the Wolfle Engineering and Financing Corporation, and in words and figures as follows, to wit:

"Northern Life Tower
12th floor
Tel. Se. 0984

Financing and Developing and Managing of Mining Properties

Wolfle Engineering & Financing Corporation

Seattle Nov. 30-1929

Dear Doctor:

Having misplaced the original letter, I have secured the carbon copy from the office and am herewith enclosing same. I believe this letter will thoroughly cover any information you desire on Cantu's recent property acquisitions. [17]

Kindest personal regards from Mr. Hemrich and myself, I am

Sincerely

(Signed) E. E. OPPELT."

there being enclosed also with the said letter in the said envelope, a carbon copy of a letter dated November 27, 1929, addressed to Mr. E. E. Oppelt, 1201 Northern Life Tower, Seattle, Washington, and in words and figures as follows, to wit:

November 27th, 1929.

Mr. E. E. Oppelt,
1201 Northern Life Tower,
Seattle, Wash.

Dear Mr. Oppelt:

Since returning from Cantu Mine I have been so completely tied up with General Ashton, at Tacoma, that I have not had the time to give you the details of the additional properties acquired for Cantu, which I wired the office about. I am leaving the letter at the office for you as I am leaving for Spokane tonight.

So there will be no misunderstanding, I want you to get this straight.

We purchased the Silver Bell Group of Five claims, on the west fork of Texas Creek. This property is about three miles west of Cantu and a mile and one-half off the U. S. Government Highway. The highway is graded on past the property and will be graveled in the spring. There is about two miles of highway to gravel. The balance of the highway is graveled to Hyder.

There is a great deal of work done on Silver Bell such as stripping open cuts and small shafts which expose several hundreds tons of High grade shipping ore that we will move early in the spring. As you know, we have been after this property ever since we bought Cantu. Had it been located in a place where it was

accessable here to fore, it would have long ago developed into a paying mine.

Joe Conners, the locater of Silver Bell is an old man and crippled with rheumatism so badly that he can barely get around. Because of such health he was forced to sell out and go to a warmer and dryer climate. Mr. Conners came to Mr. E. D. Haddon, cashier of the Bank of Hyder and Tresurer of Cantu Mine while I was in Hyder and then and there we [18] closed the deal. The price was $10,000.00. One Thousand ($1,000.00) Dollars down payment and $9,000.00 on August 1st, 1930.

The ore on Silver Bell runs from $100.00 to $150.00 per ton and the mine will pay for itself from the every start. Practically the only money necessary to put the mine in production will be spent on building a road for about one and one-half miles from the Government Highway to the mine. $5,000.00 should be ample money to start.

We also purchased twenty (20) Acres of ground which is well covered with timber. This lies at the fork of Texas Creek highway and the road leading to Cantu Mine. There are two large buildings on this property, a large pile of Lumber, mostly ship-lap, a great deal of equipment, Mess house and Bunk Houses, blacksmith ship and tools, sleighs, wagons, pack saddles, beds, bed springs and mattresses. This property is not mineralized, but it makes an

ideal junction for Cantu, Silver Bell and Riverside.

Last but by no means least, we secured a Five (5) year lease with option to purchase, Riverside Mining Companys property and equipment. This property consists of Seven (7) claims, Two (2) claim are patented. Over 2,000 feet of underground work completed from which approximately One Hundred and Twenty-five Thousand Dollars, ($125,000.00) has been mined from three (3) stopes. An excellent 100 Ton mill with floatation equipment, of the latest machinery, Deisel power plant, equipment in the mine, Bunk houses and Mess house and tools. The underground work is excellent and best obtainable. This mill has been shut down, as well as the mine, for about a year, due to damnable management by inexperienced Operators which caused discention among the stockholders and placed them in serious financial difficulties and at the mercy of the creditors. Prior to Cantus acquisition of this property a test run was made of 45 tons mined from new ore shute discovered on this property and the smelter returns as of October 7th, 1929, showed that the net returns were $3,065.56 or about $67.00 per ton. There are at present about 300 tons of this ore on the dump.

We secured this valuable property on a 15% net royalty basis, only from ore mill and mined

from Riverside mine, and without making one cent down payment, If we wish to purchase this property we can do so within the life of the lease for $120,000.00, the royaltys paid to apply on the purchase price. We are not compleed to make any fixed tonnage run or to start operations at any time, under the terms of the lease, [19] however we do expect to have the mill and mine in operation in January, 1930. If during the life of the lease we wish to discontinue operations we can do so. Absolutely no red tape attached to this deal. The Riverside Corporation was in position to loose out entirely had Cantu not taken them over.

This property is six miles from Hyder, on the U. S. Government Highway and the same distance from Cantu. Without a doubt it is a splendid deal for Cantu Mine, because to build a mill at Cantu property would be equal in dollars as to the purchase price for Riverside property and its entire equiptment. I feel confident, Riverside Mine with half a chance will more than pay for itself within the next three years.

With these extra valuable holdings it most certainly does not take much of a mathamatician to figure out what it means for the stockholders of Cantu Mining Company.

When you consider, in their inseption, the stock of Calumet-Hecla, California Consolidated, Quincy, Butte and Boston, Dominion

and many many others was sold to the public from $1.00 to $5.00 per share and in many cases these properties were not developed nearly as far as Cantu is at present, you can readily see that Cantu stock at $.50 per share is given away. The stock never should have been sold at less than par value, and it is a steal at that price.

In my judgment, Cantu Mining Company will make mining history and your and our grandchildren will still be talking about it after we are dead and gone.

Very truly yours,
CONRAD WOLFLE."

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

ANTHONY SAVAGE,
United States Attorney.
TOM DE WOLFE,
Asst. United States Attorney.

[Endorsed]: A True Bill. B. W. Pettit, Foreman Grand Jury. Anthony Savage, U. S. Attorney.

[Endorsed]: Presented to the Court by the Foreman of the Grand Jury in open Court, in the presence of the Grand Jury, and filed in the U. S. District Court Apr. 2, 1931. Ed. M. Lakin, Clerk. By S. E. Leitch, Deputy. [20]

[Title of Court and Cause.]

MOTION TO MAKE MORE DEFINITE AND/OR (IN THE ALTERNATIVE) TO STRIKE.

Comes now the defendant through his counsel, Wettrick, Wettrick & Flood and H. S. Garvin and without waiving his demurrer filed herein but at all times insisting thereupon and reserving exception to any order overruling the said demurrer, moves the Court for an order directing the plaintiff to make its indictment herein more definite and certain in the following particulars:

I.

On page 2 in paragraph I, where at line 10 the indictment sets forth "and divers other persons whose names are to the grand jurors unknown," defendant prays for an order requiring plaintiff to set out and furnish the names of all such alleged investors whose names may at the date of indictment, or at any time thereafter and up to the present date, be known to the grand jurors, or to the plaintiff, or to the United States District Attorney, or to the Postal authorities.

And, in the alternative, if no such names are known to the foregoing representatives of plaintiff, defendant prays for an order striking the said allegation from the indictment.

II.

Defendant prays for an order directing plaintiff to set forth the time, place and the occasion when

the scheme described in the second paragraph on page 2 was contrived, [21] devised or agreed upon, and further to set forth whether the defendant is alleged to have devised the plan himself to organize the corperation therein referred to, or if others participated with him in planning to organize the said corporation, to set forth the names of such other persons.

III.

Defendant prays for an order striking the allegation in line 18, on page 2, reading as follows: "without regard to the interest of the said investors," on the ground that the said allegation constitutes a mere conclusion of the pleader and lacks the foundation of any facts whatsoever upon which such a conclusion can rest.

IV.

Defendant moves to strike from the indictment the phrase beginning on line 5, page 2 thereof, reading as follows: "the great prospects of profit from and consequent desirability of an investment in the stock of said Cantu Mining Company," on the ground that an optimistic prediction with reference to the expectation of profit does not constitute a crime under the law.

V.

That the defendant moves to strike the alleged representations and promises particularized and

set forth in paragraphs numbered 1 and 2 on page 3, 3 and 4 on page 4, 5 and 6 on page 5, 7 and 8 on page 6, and 9 on page 10, all of which paragraphs are alleged to constitute a portion of the scheme, device, or artifice by which defendant is alleged to have intended to defraud investors, upon the ground that it does not appear when and where said promises and representations were made, or to whom they were made, or that they were made prior to the acts or conduct thereinafter enumerated in the said indictment and which [22] acts of conduct are alleged to have been engaged in for the purpose of executing the alleged plan or device; and upon the further ground that under the law it is necessary to establish the scheme, plan or device as having been arrived at prior to any conduct having been taken pursuant thereto and that it must affirmatively appear in an indictment under the law that any such scheme or device existed as a condition precedent before any acts or conduct can come within the ban of the statute.

And, in the alternative, defendant moves for an order requiring the plaintiff to set forth when and where, and under what circumstances, and to what persons said promises or representations were made.

VI.

Defendant further moves for an order directing the plaintiff to set forth the time and place when the part of the said scheme and artifice alleged in

the indictment, commencing with line three on page 8, took place.

VII.

Defendant moves to strike the whole of the paragraph numbered 8 on page 6, on the ground that the paragraph states no ultimate fact but constitutes merely the conclusion of the pleader and that that conclusion and opinion of the pleader therein stated is inflammatory and prejudicial to this defendant.

VIII.

Defendant moves to strike paragraph 9 on page 7, on the ground that the paragraph states no ultimate fact but constitutes merely the conclusion of the pleader and that the conclusion and opinion of the pleader therein stated is inflammatory and prejudicial to this defendant.

.....,

.....,

Attorneys for Defendant. [23]

Copy received January 8, 1932.

DE WOLFE,

Asst. U. S. Atty.

[Endorsed]: Filed Jan. 8, 1932. Ed. M. Lakin, Clerk. [24]

[Title of Court and Cause.]

MOTION TO QUASH.

Comes now the defendant and appearing through his attorneys, Wettrick, Wettrick & Flood and H. Sylvester Garvin, moves the Court for an order quashing the indictment on file herein, upon the ground and for the reason:

I.

That it states no fact sufficient to constitute a crime against the laws of the United States.

II.

That in substance it is founded, not upon facts, but upon the conclusions of the pleader who framed it, and that the said conclusions and opinions of the pleader are couched in inflammatory language and constitute great prejudice to this defendant.

WETTRICK, WETTRICK & FLOOD,
H. SYLVESTER GARVIN,
Attorneys for Defendant.

Copy received Jan. 8, 1931.
TOM DE WOLFE,
Asst. U. S. Atty.

[Endorsed]: Filed Jan. 8, 1932. Ed. M. Lakin, Clerk. [25]

[Title of Court and Cause.]

DEMURRER.

Said defendant, Conrad Wolfle, by Wettrick, Wettrick & Flood and H. Sylvester Garvin, his attorneys, comes into Court and says that the said indictment, and all of the counts thereof, and the matters and things therein set forth are, as therein alleged and set forth, not sufficient in law to compel the said defendant to answer thereto.

I.

The Court has no jurisdiction of the person of the defendant or the subject matter therein stated.

II.

That several crimes have been alleged and improperly united.

III.

That the indictment does not state facts sufficient to constitute a crime against the United States of America.

IV.

That said indictment is defective and uncertain in this, that it does not set forth the time and place where the said scheme or plan was devised or where and when the said defendant contrived the said scheme or plan.

V.

That said indictment does not set forth any act or acts against this defendant sufficient to make him a party to [26] the said crime.

VI.

That the said indictment charges the formation of a plan or a device by setting out the conclusions and the opinions of the pleader and sets forth no sufficient facts upon which such conclusions and opinions can be founded. That moreover the said indictment alleges that the said plan thus charged was carried forward by certain representations and promises which consisted mostly of conclusions and opinions, all of which are inflammable and highly prejudicial and unnecessary to this indictment.

VII.

Said indictment attempts to carve out of separate counts various substantive crimes, all of which should be alleged in one count.

WETTRICK, WETTRICK & FLOOD,
H. SYLVESTER GARVIN,
Attorneys for Defendant.

Copy rec'd. Jan. 8, 1931.
DE WOLFE,
Asst. U. S. Atty.

[Endorsed]: Filed Jan. 8, 1932. Ed. M. Lakin, Clerk. [27]

[Title of Court and Cause.]

RULING ON MOTION TO STRIKE, DEMURRER AND MOTION TO QUASH. ARRAIGNMENT AND PLEA.

Now on this 8th day of January, 1932, Tom DeWolfe, Assistant United States District Attorney, appearing for the plaintiff and F. J. Wettrick, Esq., and Geo. E. Flood, Esq., appearing as counsel for the defendant, the defendant's exceptions to the Court's ruling on motion for continuance is presented, allowed and filed. On motion of Mr. Flood, H. Sylvester Garvin, Esq., is noted as associate counsel for the defendant. Said defendant is arraigned and answers that his true name is Conrad Wolfle.

The defendant now presents for filing a demurrer, motion to make more definite and certain, or in the alternative to strike, and supporting affidavit of the defendant, and motion to quash, and the same come on for hearing. Arguments are heard on the demurrer, and same is overruled and an exception noted. Arguments are heard on paragraph one of the motion to make more definite and certain and/or in the alternative to strike. The government counsel stating, in response to an inquiry of the court, that the government has no objection to, and will give the names, in its opening statement to the trial jury, therein sought to be disclosed that have come to the knowledge of the

government, the court denies the motion to strike, and an exception is noted to the defendant.

Arguments are heard separately on each of paragraphs two to eight, inclusive, of the motion and each is separately denied and a separate exception noted to each denial to said defendant.

Arguments are heard separately on each of paragraphs two to eight, inclusive, of the motion and each is separately denied and a separate exception noted to each denial to said defendant.

The motion to quash the indictment is denied, without argument, being based on the same grounds as the demurrer. An exception is noted to the defendant. Thereupon the defendant enters a plea of not guilty. (Journal No. 20, page 27.) [28]

[Title of Court and Cause.]

MOTION FOR CONTINUANCE OF TRIAL DATE.

Defendant, by his attorneys, Wettrick, Wettrick & Flood, now moves the Court for an order continuing the trial date herein, by reason of the illness of the defendant, and in order to afford reasonable and sufficient opportunity to the defendant to recover from his illness and prepare for his defense.

This motion is based upon the affidavits hereto attached and the files herein.

WETTRICK, WETTRICK & FLOOD,
Attorneys for Defendant. [29]

AFFIDAVIT.

State of Washington,
County of Spokane.—ss.

Conrad Wolfle, being first duly sworn, deposes and says:

That in the month of October, 1931, he was in the employ of the Idamont Gold Mining Company in Lewis and Clark County, State of Montana, as superintendent of their mining operations.

On the evening of October 16, 1931, a drunken brawl occurred at the bunk-house. Affiant went over to the bunk-house to see if he could quiet the disturbance and as affiant opened the door of the bunk-house one of the men struck him across the head with a heavy iron pipe.

That as a result of such blow affiant suffered severe concussion of the brain; that affiant was in the hospital in Helena, Montana, for a period of ten days and since that time has been at his home; that as a result of the injury then inflicted, affiant has impaired vision and is suffering from dizziness and very severe headaches; that affiant is unable to work and is unable to concentrate his attention

upon any matter for any length of time without bringing on severe and blinding headaches.

CONRAD WOLFLE.

Subscribed and sworn to before me this 14th day of December, 1931.

[Seal] DON F. KIZER,
Notary Public in and for the State of Washington, residing at Spokane. [30]

AFFIDAVIT.

State of Washington,
County of Spokane.—ss.

T. M. Ahlquist, being first duly sworn, deposes and says:

That he is a physician and surgeon duly authorized to practice medicine in the State of Washington and resides at Spokane therein;

That one Conrad Wolfle has been under his care for some time, suffering the after effects of concussion of the brain;

That at the present time said Wolfle is suffering from impaired vision and complains of severe headaches and tests indicate quite a degree of lack of coordination.

There can be no doubt that the injury inflicted upon said Wolfle has had a serious effect upon his health and that he will be unable at the present time, or for some time to come, to concentrate his attention upon any serious matter for any length of time.

T. MAURICE AHLQUIST.

Subscribed and sworn to before me this 14th day of December, 1931.

[Seal] DON F. KIZER,
Notary Public in and for the State of Washington, residing at Spokane.

Received a copy of the within motion this 18th day of Dec., 1931.

ANTHONY SAVAGE,
Attorney for Plaintiff.
M. P.

[Endorsed]: Filed Dec. 21, 1931. Ed. M. Lakin. Clerk. [31]

AFFIDAVIT OPPOSING CONTINUANCE.

State of Washington,
County of King.—ss.

George E. Moser, being first duly sworn, deposes and says:

I am a United States Post Office Inspector assigned jointly with Inspector J. S. Swenson for investigation of the case involving Conrad Wolfle, on the charge of using the United States mails in furtherance of a scheme to defraud.

On Thursday, December 17, 1931, I called the home of the said Conrad Wolfle by telephone at Spokane, Washington, about 9:00 A. M. and asked whether Mr. Wolfle was at home. His wife replied

that he was down town visiting his doctor. She promised to have him call me when he returned. No call had come by noon and I again called the house and was advised that he had not returned. About 2:30 P. M. I called a third time, when Mrs. Wolfle told me that her husband had gone to bed and that I would not be permitted to see him.

On Saturday, the 19th inst., I accompanied Dr. E. S. Jennings of Spokane to the home of Mr. Wolfle for a physical examination of the defendant, to ascertain whether he is in a condition to appear in court for trial in the pending case. We reached the house about 10:15 A. M. Mr. Wolfle was dressed and came to the door to admit us. Dr. Jennings made his examination and thereafter expressed to me the opinion was well able to attend the trial.

From my own observation of the defendant Wolfle during his examination by the doctor I came to the conclusion that he would be well able to attend the trial as scheduled; that he answered the doctor's questions very deliberately and cautiously and was plainly desirous of giving the doctor the impression that he was laboring under a strain. A scar on his forehead which he said had been caused by an injury sustained in a mine, was fully healed and there is no physical evidence of disability.

GEORGE E. MOSER.

Subscribed and sworn to before me, a deputy clerk of the United States District Court, at Seattle,

Washington, this twenty-first day of December, 1931.

[Seal] S. COOK,
Deputy Clerk, U. S. District Court,
Western District of Washington.

Copy Rec'd. Dec. 21/31.
WETTRICK, WETTRICK & FLOOD.

[Endorsed]: Filed Dec. 23, 1931. Ed. M. Lakin, Clerk. [32]

H. P. MARSHALL E. S. JENNINGS
DRS. MARSHALL and JENNINGS
424 Old National Bank Bldg.
Spokane, Washington

AFFIDAVIT OPPOSING CONTINUANCE.

State of Washington,
County of Spokane.—ss.

E. S. Jennings being first duly sworn upon oath depose and say:

Dr. E. E. Jennings is a physician and surgeon with offices at 424 Old National Bank Building, Spokane, Washington, who made an examination of Mr. Conrad Wolfle, December 19, 1931 and reports the following:

HISTORY. This is a well preserved man age 60. He claims that he was struck on the forehead on October 16, 1931; that he was rendered momentarily unconscious; and that he sustained a loss

of an excessive amount of blood. He was immediately given first aid treatment and that night taken to the hospital where he spent ten days. At the expiration of his stay in the hospital he returned to Spokane and consulted Dr. John Semple. He states that Dr. Semple explained to him the numerous possibilities such as headache, loss of memory, etc. which are in some instances sequelae of head injuries.

He further states that he later consulted his family physician, Dr. T. M. Ahlquist, complaining of headache and inability to concentrate. He claims these symptoms are now present and have been present intermittently since the time of his injury October 16, 1931. He complains of failing vision in the left eye. He claims to have had nose bleed during the night since leaving the hospital. He was told that the X-ray plates taken while in the hospital showed no skull fracture.

PHYSICAL EXAMINATION. He has a small healed scar on the left forehead and a beginning cataract in the left eye which accounts for his loss of vision in the left eye. Reaction of pupil to light and accommodation is normal; heart and lungs are negative; abdomen negative; blood pressure, systolic 142; diastolic 84; pulse 98; all reflexes normal; no Romberg and no Argyll Robertson's pupil.

CONCLUSION. In my opinion for a man of 60 years of age this man is in excellent physical condition. All his symptoms are subjective and all his

complaints are possibly true. However, he has been well coached in the symptoms that may occur following an injury such as he has sustained. He is intelligent enough to take advantage of this knowledge. In my opinion if brought to trial he would sustain no material injury.

E. S. JENNINGS, M. D.

Subscribed and sworn to before me this 19th day of December, 1931.

[Seal] G. M. FERRIS,
Notary Public in and for the State of Washington, residing at Spokane.

Service acknowledged. Dec. 21/31.
WETTRICK, WETTRICK & FLOOD,

[Endorsed]: Filed Dec. 23, 1931. Ed. M. Lakin, Clerk. [33]

[Title of Court and Cause.]

AFFIDAVIT OF TOM DeWOLFE IN OPPOSITION TO DEFENDANT'S MOTION FOR CONTINUANCE.

United States of America,
Western District of Washington,
Northern Division.—ss.

Tom DeWolfe, being first duly sworn, on oath deposes and says:

That he is an Assistant United States Attorney for the Western District of Washington, and as

such makes this affidavit for and on behalf of the plaintiff herein.

That indictment in the instant cause was returned against the defendant, April 2, 1931; that defendant's motion for continuance which was filed and served on the 18th day of December, 1931, is the fourth motion for continuance of the trial date which he has filed and served herein.

That affiant is informed and verily believes as follows: That defendant and his attorneys of record herein have been aware of the investigation carried on by Post Office Inspectors affecting the Cantu Mining Company and the connections therewith of the defendant, Conrad Wolfle, and that said defendant has had ample time for preparation of his defense; that on August 22, 1930, the defendant, Wolfle, was interviewed at length in the office of the Post Office Inspector-in-Charge at Seattle, at which time he was fully advised as to the charges which have been made against him by investors of his company, and that a prosecution would likely follow; again the defendant was interviewed by Post Office Inspector J. S. Swenson at Spokane, Washington, on October 8th and 9th, 1930, at which time the [34] defendant begged the said Inspector not to cause the said indictment or to start the prosecution before the end of the year stating at that time that he would ask no further delay.

That witnesses had already been subpoenaed to appear before the grand jury convened October 14,

1930, to present evidence against this defendant in an effort to secure his indictment, but at the urgent requests of the defendant and his attorney, Fred J. Wettrick, the witnesses were dismissed and presentment of the case to the grand jury was postponed.

Another grand jury convened December 17, 1930, and the case was again continued because of appeals for further delay by the defendant, his excuse being at that time, as on all occasions, that he was negotiating for financial assistance in the east. The case was again passed for the same reason at the time of the session of the grand jury of February 18, 1931. The indictment was finally returned by the grand jury convened April 1, 1931.

After notice to the defense attorneys that the case would be set down for trial within a reasonable time after the return of the indictment, Hon. George M. Bourquin set the case for trial on May 20, 1931. Later Fred J. Wettrick, attorney for defendant, appeared and moved for a continuance on the ground that the defendant was still in New York carrying on negotiations affecting the Cantu Mining Company. The government did not object at that time to continuing the case until June 23, 1931. At the time the case was set for trial on June 23, 1931, the defense attorney, Fred J. Wettrick, made no protest to the Court.

That the defendant has had ample time for preparation of the trial of this cause as will be shown by his other motions and affidavits for continuance previously filed herein on the [35] ground that he was then ill and needed further time to prepare for the trial of this case; that a continuance of the trial of this cause in August, 1931, was granted due to an operation for appendicitis performed on the said defendant by P. M. Ahlquist, M. D., physician and surgeon of Spokane, Washington; that more than fifty subpoenas have been issued by the Clerk of the Court for the above entitled district for the attendance of witnesses here at the trial of the above entitled cause on January 12, 1932; that the government has expended a substantial sum of money in preparation for the trial of this cause on the date it has been set for trial, expenses have been incurred in the subpoena of witnesses and the making of arrangements for the attendance of witnesses, as aforesaid, in the trial of the above entitled cause on January 12, 1932; that this is the third time in which witnesses have been subpoenaed on behalf of the government in the above entitled cause, at which time approximately fifty witnesses subpoenaed and wires or personal notification were of necessity sent to the witnesses ordering them not to appear for trial; that the government has suffered considerable expense by the dilatory tactics of the defendant in relation to his frequent demands for continuance.

That the present motion and affidavit for continuance which were served and filed on December 18, 1931, are inadequate and were served and filed untimely in that this cause was set for trial on November 16, 1931, and at that time counsel for the defendant made no mention to the Court of the illness, if any, of the defendant as allegedly set forth in the affidavit in support of his motion for continuance filed December 18, 1931, and stated to the Court that he would rather have the case tried January 19th, but did not state that the defendant, Wolfle, was ill and gave every assurance to the government counsel that no [36] further continuance of the trial date would be requested as had been the case in the past; that affiant who is in charge of the prosecution of this case in behalf of the United States had no inkling or idea that further continuance would be requested by defendant until approximately on the 16th day of December, 1931, when counsel for the defendant advised affiant that he was intending to file a motion for continuance, which motion was not filed until December 18, 1931, as aforesaid; that between the date of November 16, 1931, when the case was set for trial, on January 12, 1932, and the date of this affidavit the government, not being mindful of the fact that the defendant intended to wait until a late date before filing his motion for continuance, made arrangements for the trial of this cause and the subpoenaing of witnesses as aforesaid.

Wherefore, affiant prays that the above entitled cause not be continued, but that the same be tried on the date heretofore set, to-wit, January 12, 1932.

TOM DE WOLFE.

Subscribed and sworn to before me this 23rd day of December, 1931.

[Seal] S. COOK,

Deputy Clerk, U. S. District Court, Western District of Washington.

Copy Rec'd Dec. 21-31.

WETTRICK, WETTRICK & FLOOD.

[Endorsed]: Filed Dec. 23, 1931. Ed. M. Lahin, Clerk. [37]

[Title of Court and Cause.]

MEMORANDUM RULING AND ORDER OF MOTION OF DEFENDANT FOR A CONTINUANCE.

The defendant's motion has been submitted upon certain affidavits, depositions and the examination in open court of George E. Moser, Post Office Inspector.

The affidavits which have been considered by the Court are: One by the defendant and one by Dr. T. M. Ahlquist, both dated December 13th, 1931; an affidavit of Dr. E. S. Jennings dated December 19th, 1931; an affidavit of George E. Moser dated December 21st, 1931, and an affidavit of Tom De Wolfe dated December 23rd, 1931.

The depositions which have been considered by the Court are those of Doctors T. M. Ahlquist, D. H. Lewis and John H. O'Shea, all taken December 22nd, 1931.

Upon consideration of such affidavits, depositions and testimony the motion for a continuance is denied.

The Clerk is directed to immediately notify the United States Attorney and the attorney for the defendant of this ruling and order.

Signed at Tacoma, Washington, this 24th day of December, 1931.

EDWARD E. CUSHMAN;
Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, Dec. 24, 1931. Ed M. Lakin, Clerk.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Dec. 26, 1931. Ed. M. Lakin, Clerk. [38]

[Title of Court and Cause.]

EXCEPTION.

Comes now the defendant and excepts to the ruling and order of the Court on the motion of defendant for a continuance, upon which motion the Court rendered its memorandum ruling at Ta-

coma, Washington, on the 24th day of December, 1931.

WETTRICK, WETTRICK & FLOOD,
H. SYLVESTER GARVIN,
Attorneys for Defendant.

The foregoing exception is hereby allowed.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: Filed Jan. 8, 1932. Ed. M. Lakin, Clerk. [39]

VERDICT.

District Court of the United States, Western District of Washington, Northern Division.

No. 41369

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CONRAD WOLFLE,
Defendant.

We, the jury in the above-entitled cause, find the defendant Conrad Wolfle is guilty as charged in Count I of the Indictment herein; and further find the defendant Conrad Wolfle is guilty as charged in Count II of the Indictment herein; and further find the defendant Conrad Wolfle is guilty as charged in Count III of the Indictment herein;

and further find the defendant Conrad Wolfle is guilty as charged in Count IV of the Indictment herein; and further find the defendant Conrad Wolfle not guilty as charged in Count VI of the Indictment herein.

A. E. CRONARD,
Foreman.

[Endorsed]: Filed Feb. 17, 1932. Ed. M. Lakin, Clerk. [40]

[Title of Court and Cause.]

MOTION IN ARREST OF JUDGMENT.

Comes now the defendant, Conrad Wolfle, and moves the Court to arrest the judgment and not pronounce the same in the above-entitled cause, for the following reasons, to-wit:

I.

That neither the indictment, nor any of the counts therein, charge any crime against this defendant.

This motion is based upon the files, records and proceedings herein.

WETTRICK, WETTRICK & FLOOD,
H. S. GARVIN,
Attorneys for Defendant.

Received a copy of the within motion this 19th day of March, 1932.

ANTHONY SAVAGE,
United States Attorney.

[Endorsed]: Filed Mar. 21, 1932. Ed. M. Lakin, Clerk. [41]

[Title of Court and Cause.]

MOTION FOR A NEW TRIAL.

Comes now the above-named defendant and moves the Court for an order granting to him a new trial in the above-entitled cause for the following reasons:

I.

Irregularity in the proceedings of the Court, jury and the plaintiff, and in the orders of the Court by which the defendant was prevented from having a fair trial.

II.

Misconduct of the plaintiff and jury.

III.

Accident and surprise which ordinary prudence could not have guarded against.

IV.

Insufficiency of the evidencet to justify the verdic of the jury, and that such verdict is against law.

V.

Error in law occurring to trial and excepted to at the time by defendant.

VI.

Error in overruling the demurrer of this defendant to the indictment, and to each count therein.

VII.

Error in overruling the motion to quash and denying [42] motion to make more definite and certain.

VIII.

That the verdict is contrary to the law of the case.

IX.

That the Court upon the trial admitted incompetent evidence offered by the United States.

X.

That the Court upon the trial excluded competent evidence offered by the defendant.

XI.

That the Court improperly instructed the jury to the defendant's prejudice.

XII.

That the Court improperly refused, to defendant's prejudice, to give correct instructions tendered by the defendant.

XIII.

The Court erred in refusing to direct a verdict of not guilty at the close of the Government's case.

XIV.

The Court erred in refusing to direct a verdict of not guilty at the close of all the evidence.

This motion is based upon the files, records and proceedings herein.

WETTRICK, WETTRICK & FLOOD,
H. S. GARVIN,

Attorneys for Defendant.

Received a copy of the within motion for new trial this 19th day of March, 1932.

ANTHONY SAVAGE,
United States Attorney.

[Endorsed]: Filed Mch. 21, 1932. Ed. M. Lakin, Clerk. [43]

[Title of Court and Cause.]

HEARING ON MOTION IN ARREST OF JUDGMENT AND FOR NEW TRIAL.

Now on this 21st day of March, 1932, Anthony Savage, United States District Attorney and Tom DeWolfe, Assistant United States District Attorney, appearing for the government and F. J. Wettrick, Esq. and Geo. E. Flood, Esq., appearing as counsel for the defendant, the defendant's motion in arrest of judgment and motion for new trial is presented by Geo. E. Flood, Esq., of counsel for the defendant. Each motion is denied and exceptions are allowed.

Journal No. 20 at page 281. [44]

[Title of Court and Cause.]

SENTENCE.

Comes now on this 21st day of March, 1932, the said defendant, Conrad Wolfle, into open Court for sentence and being informed by the Court of the charges herein against him and of his conviction of record herein, he is asked whether he has any legal cause to show why sentence should not be passed and judgment had against him and he nothing says save as he before hath said. Wherefore, by reason of the law and the premises it is ordered, adjudged and decreed that the defendant is guilty of violation of Section 215 Penal Code as charged in counts 1, 2, 3, and 4 of the indictment and that said defendant be punished by being imprisoned for a term of four (4) years on each of the four counts, said imprisonment to run concurrently and not consecutively. The place of imprisonment to be at the United States Penitentiary at McNeil Island, Washington, or until such time as the Attorney General of the United States may designate some other place as the place of imprisonment. It is further ordered, adjudged and decreed that the defendant pay to the United States a fine in the sum of $250.00 on each count and that said defendant be further imprisoned until the said fine shall have been paid or he be otherwise discharged by law. And it is the further judgment of the Court that said defendant pay the taxable costs of prosecution herein. It is further ordered, adjudged and decreed that the defendant be com-

mitted to the custody of the Attorney General of the United States and the Warden of the United States Penitentiary at McNeil Island, Washington, his authorized representative. And the defendant is remanded to the custody of the United States Marshal for delivery to the Warden of the United States Penitentiary at McNeil Island, Washington.

Judgment and Decree Volume 7, at page 554.
[45]

[Title of Court and Cause.]

ORDER EXTENDING THE TIME TO AND INCLUDING JUNE 20TH, 1932, FOR LODGING AND FILING THE BILL OF EXCEPTIONS HEREIN AND EXTENDING THE TERM OF COURT THEREFOR.

And now upon the stipulation of plaintiff and defendant, by their respective counsel, filed this day, that the defendant, Conrad Wolfle, may have an extension of time up to and including the 20th of June, 1932, within which to lodge and serve his bill of exceptions herein and that the present term of Court be deemed so extended,

NOW, THEREFORE, IT IS HEREBY ORDERED that the defendant, Conrad Wolfle, may hereby have an extension up to and including the 20th day of June, 1932, within which to lodge and serve his proposed bill of exceptions herein, and that the present term of Court and citation be and

hereby is extended for that length of time for that purpose.

Dated this 21st day of March, 1932.

EDWARD E. CUSHMAN,
United States District Judge.

Received a copy of the within order this ..... day of March, 1932.

Attorney for Plaintiff.

O. K.
TOM DE WOLFE,
Asst. U. S. Atty.

[Endorsed]: Filed Mar. 21, 1932. Ed. M. Lakin, Clerk. [46]

[Title of Court and Cause.]

PETITION FOR APPEAL.

Comes now the defendant, Conrad Wolfle, hereing, and having heretofore filed in the above-entitled cause his assignments of error, and hereby gives notice of appeal that he appeals to the Circuit Court of Appeals for the Ninth Circuit, from the judgment and sentence of this Court entered on the 21st day of March, 1932, based upon the verdict of the jury finding the defendant guilty on Counts I to IV as charged in the indictment, and the said defendant respectfully prays this Court that his appeal be allowed.

WETTRICK, WETTRICK & FLOOD,
H. S. GARVIN,
Attorneys for Defendant.

Received a copy of the within Petition for Appeal this 15th day of April, 1932.

TOM DE WOLFE,
Asst. United States Attorney.

[Endorsed]: Filed Apr. 16, 1932. Ed. M. Lakin, Clerk. [47]

[Title of Court and Cause.]

NOTICE OF APPEAL.

To the United States of America, Plaintiff, and to Anthony Savage, United States District Attorney, and to Tom DeWolfe, His Assistant:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the defendant, Conrad Wolfle, above named, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment, sentence and order entered in the above-entitled cause on the 21st day of March, 1932, and that the certified transcript of record will be filed in the said Appellate Court within the time provided by law.

WETTRICK, WETTRICK & FLOOD,
Attorneys for Defendant.

Copy received this 15th day of April, 1932.

TOM DE WOLFE,
Asst. U. S. Atty.

[Endorsed]: Filed Apr. 16, 1932. Ed. M. Lakin, Clerk. [48]

[Title of Court and Cause.]

ASSIGNMENTS OF ERROR.

Comes now the defendant, Conrad Wolfle, in the above-entitled cause, and in connection with his appeal and petition for appeal in this cause, submitted and filed herewith, assigns the following errors which said defendant avers and says occurred in the proceedings and trial of the above-entitled cause and in the above-entitled Court, and upon which he relies to reverse, set aside and correct the judgment and sentence herein entered, and says that there is manifest error appearing upon the face of the record and in the proceedings, in this:

I.

The Court erred in overruling the demurrer to the indictment.

II.

The Court erred in refusing to quash the indictment.

III.

The Court erred in denying the motion to make more definite and certain, or in the alternative to strike.

IV.

The Court erred in denying the defendant's motion of December 18, 1931, decided by the Court on December 24, 1931, for a continuance of the

trial of the above-entitled cause, which motion was made by reason of defendant's illness and physical inability to prepare for and to stand trial. [49]

V.

The Court erred in denying the motion of the defendant made during the course of the trial on or about the 4th day of February, 1932, for a continuance of the trial of the above-entitled cause by reason of the defendant's illness and inability to stand trial or to testify in his own behalf.

VI.

The Court erred in admitting in evidence Exhibit No. 99, the same being a letter written by defendant to a certain Lena Hartigan, she not being personally present or a witness in the cause, and the letter offered upon the purported identification of Witness Kimball, which exhibit purports to contain certain representations made by defendant Wolfle.

VII.

The Court erred in rejecting defendant's Exhibit A—which exhibit was a bulletin of the U. S. Geological Survey published in 1914 pursuant to law, containing data establishing the success of the United Copper Mine under the supervision and management of defendant Conrad Wolfle.

VIII.

The Court erred in admitting in evidence the testimony of the plaintiff's witness, Grace Snyder, to the effect that she was the secretary of the defendant, Conrad Wolfle, and that while acting as his stenographer she took stenographic notes of a letter dictated to her by defendant Conrad Wolfle which the said Conrad Wolfle wrote to his wife, Madeline Wolfle, in Spokane, Washington, and that her stenographic notes which she read and translated in the course of her testimony were in substance as follows:

That the defendant, Conrad Wolfle, was very pleased [50] to receive a letter from home and learn that his daughter Virginia had done so well in a musical recital and that he was very proud of his daughter Virginia. That he wished in this letter to reassure his wife of his physical condition and that he had had a thorough examination by his doctor, who found him in excellent health, fit and able to subsist upon a diet of cross-cut saws; that the doctor told him that his heart functioned normally and that he felt fine and was going to work hard to make the Cantu Mining enterprise a success. That he had met a banker friend of his formerly from Spokane, now in business in Seattle, who told him that Seattle was a hard town to break into, but that he (the defendant Wolfle) was going to break in and that when he did he would rob them all blind!

Which said letter the witness Snyder testified was dictated and signed by the defendant, Conrad Wolfle, and addressed and mailed to the defendant's wife in Spokane.

IX.

The Court erred in refusing the defendant's testimony offered to show that the dissatisfied stockholders were being refunded the purchase price of the stock paid by them, and the total amount refunded.

X.

The Court erred in admitting in evidence Exhibits 112, 115, 118 over the objection and the exception of the defendant herein, which said exhibits were the letters from Wolfle to Wade in New York City, written at a time and date subsequent to the indictment herein. [51]

XI.

The Court erred in instructing the jury as follows:

> "This does not mean that you have to be so convinced that the scheme to defraud included all of the false representations and promises described in the indictment, but you do have to be convinced beyond a reasonable doubt from the evidence before you can lawfully convict that the defendant devised or intended to devise a scheme or artifice to defraud by means

of at least one of the false representations or promises described in the indictment."

XII.

The Court erred in instructing the jury as follows:

"You are instructed that the defendant's belief that the Cantu property was of value would not justify inducing the purchase of stock in that company by fraudulent representations. Defendant's belief that the Cantu Mining Company would eventually develop and profitably operate a mine on its property, if it could secure the necessary capital, would not justify him in securing that capital from others by means of the false and fraudulent representations, or false and fraudulent promises, as for example: Such belief would not justify or excuse him in representing to such investors —if it be a fact that he did so represent,—that all of the money paid by investors for stock in the company would go to the treasury of the company for the development of the mining property if he well knew at the time of so representing that such money would neither go to the treasury of the company nor to the development of its property."

XIII.

The Court erred in instructing the jury as follows:

"That the defendant is not guilty in so far as any statements made by him were made in the honest belief that they were true, no matter how untrue in fact they were, and no matter how careless or credulous he had been in the belief that they were true. But the mere fact that someone had falsely represented to the defendant that which he in turn represented to the investors, would be no defense if the defendant knew it to be false at the time of making the representation to the investors. If one after hearing of the falsity of a representation, continues to make it, he cannot escape responsibility because he originally believed it to be true."

XIV.

The Court erred in instructing the jury as follows:

"You will not allow yourselves to be influenced [52] to the prejudice of the defendant by the statements, if any, made by the salesmen of the stock of the Cantu Mining Company, of which the defendant had no knowledge and in which he did not in any way cause them to make, or aid, abet, counsel, command, induce or procure the making."

XV.

The Court erred in instructing the jury as follows:

"You are required to decide the questions submitted to you—the truth of the charges against the defendant—upon the strong probabilities of the case, and the probabilities must be so strong as not necessarily to exclude all doubt and possibility of error, but to exclude all reasonable doubt."

XVI.

The Court erred in instructing the jury as follows:

"In determining whether the defendant caused the mailing of the particular letter described in the particular Count of the indictment being considered, you will take into account whatever the evidence shows as to the method used in carrying on the business with which the defendant was connected and the opportunity the defendant had to know those methods and what, if anything, the defendant had to do with the letter therein described before its mailing. Then, in determining whether the defendant caused it to be mailed, you have a right to give weight, in the absence of any rebutting evidence, to the presumption that every man is presumed to intend the natural consequences of his voluntary acts."

XVII.

The Court erred in instructing the jury as follows:

"You are instructed that there is a statute in the United States which in substance provides that not only is a person who directly commits an act made an offense by any law of the United States a principal offender, but any person who aids, abets, counsels, commands, produces or procures the commission of such an act is likewise a principal offender. To abet means to encourage, to incite—mere knowledge that another is committing an offense is not sufficient to make of one a principal offender."

XVIII.

The Court erred in instructing the jury as follows:

"While in a scheme to defraud it is necessary that the postoffice establishment be used as alleged. It is not necessary that the purpose to use the postoffice be a part of the scheme or plan. It is only [53] necessary to complete the offense that it be in fact used as alleged."

XIX.

The Court erred in instructing the jury as follows:

"The indictment alleges that the scheme to defraud was devised by the defendant prior to the 1st day of January, 1929. This allegation of the indictment is not a material obligation in that it has to be proven by evidence beyond

a reasonable doubt that it was actually devised by defendant prior to January 1, 1929."

XX.

The Court erred in instructing the jury as follows:

"You should not find the defendant guilty unless convinced beyond a reasonable doubt that one or more of the false pretenses, representations or promises described in the First Count of the indictment were a part of the scheme of the defendant to defraud, even though you are convinced by the evidence beyond a reasonable doubt that in furtherance of a scheme to defraud he made false representations and promises not described in the indictment, but you may consider other false representations and promises of the defendant, if any have been shown, of a similar character in determining his intent in making any of those described in the indictment which it has been shown by the evidence beyond a reasonable doubt he made."

XXI.

The Court erred in instructing the jury as follows:

"You will not by lot determine what your verdict should be, nor will you compromise or trade in reaching a verdict, nor submit to a verdict merely to end the case or to be with

the majority. But the fact that a majority of the jurors may be opposed to you should be carefully considered by you in determining whether or not a position taken by you may not after all be wrong."

XXII.

The Court erred in refusing to give to the jury defendant's requested instruction No. 11 reading as follows:

"A reasonable doubt in this connection is such a doubt as will cause reasonable, prudent and considerate men to hesitate or waver in the graver and more important concerns of human life before acting upon the truth of the matters charged or alleged. Such a doubt may arise from the evidence or from the lack of evidence. On the one hand you will not be moved or swayed by doubts [54] which are purely imaginary and capricious, and on the other hand you will not convict in the face of doubts which are real and substantial. If from a fair and candid consideration of all the testimony you can say upon your oaths as jurors that you have an abiding conviction of the truth of the charge to a moral certainty, then you have no reasonable doubt and should convict. If you have no such moral convictions, or if you entertain doubts for which sane and satisfactory reasons can be assigned in your own

minds, you must give the defendant the benefit of that doubt and find him not guilty."

XXIII.

The Court erred in refusing to give to the jury defendant's requested instruction No. 19, reading as follows:

"Mere knowledge, acquiescence or approval of the act, without cooperation or agreement to cooperate, is not enough to constitute one a party to a scheme to defraud. There must be intentional participation in the transaction with a view to the furtherance of the common design and purpose, as alleged in the indictment."

XXIV.

The Court erred in refusing to give to the jury defendant's requested instruction No. 21, reading as follows:

"You are instructed the defendant's intent is the determining factor in establishing whether the scheme or artifice defined by them was a scheme to obtain money or property by the use of false or fraudulent representations, pretenses or promises. A scheme conceived and pursued in good faith is not such a scheme."

XXV.

The Court erred in refusing to give to the jury defendant's requested instruction No. 22, reading as follows:

"You are instructed that if you find, or have a reasonable doubt that any letter or circular alleged to have been mailed in any count of the indictment was not mailed for the purpose of executing the artifice or scheme as charged in such count of the indictment, then I instruct you to return a verdict of not guilty on such count or counts."

XXVI.

The Court erred in refusing to give to the jury [55] defendant's requested instruction No. 23, reading as follows:

"You are instructed that the defendant in this action is not on trial for having received money or property from others through false or fraudulent representations, pretenses or promises—that is a matter that would not be within the jurisdiction of this court—but he is on trial for having devised, or intending to devise, a scheme or artifice to obtain goods or property by the use of false or fraudulent representations, pretenses or promises, and for having used the mails of the United States in the execution of such scheme or artifice."

XXVII.

The Court erred in refusing to give to the jury defendant's requested instruction No. 25, reading as follows:

"You are instructed that evidence of sales of stock by defendant has only been admitted for the purposes of tending to establish the existence of the scheme or artifice charged in the indictment, and the intent of the defendant; and you are not to convict the defendant on account of any such sales alone, for the reason that the defendant is not on trial for the fraudulent sale of stock or for obtaining money or property by false or fraudulent representations, pretenses or promises."

XXVIII.

The Court erred in refusing to give to the jury defendant's requested instruction No. 27, reading as follows:

"I instruct you that before you can find the defendant guilty, it must be established beyond a reasonable doubt by the evidence in this case that two things were done by him. It must appear, first, that the defendant devised a scheme or artifice, to defraud; second, that the defendant, for the purpose of executing such scheme or artifice to defraud, or attempting to do so, deposited, or caused to be deposited, in the Post Office of the United States for the purpose of having the same sent by the Post Office establishment of the United States, and in furtherance of the scheme, the letters and circulars mentioned, described and counted on in the several counts of the indictment before you.

In your deliberations keep steadily in view two questions: (1) Did the defendant devise the scheme set forth in the indictment with intent to defraud? (2) Did the defendant with intent to execute the scheme (if you find that he devised the scheme with intent to defraud) deposit or cause to be deposited in the United States mails, the letters, [56] circulars, etc., counted on in the indictment and if from all the evidence you find that either of these questions must be answered in the negative, then your verdict must be not guilty."

XXIX.

The Court erred in refusing to give to the jury defendant's requested instruction No. 28, reading as follows:

"You are instructed that it is not unlawful for the defendant to formulate a plan for organizing a corporation to purchase such a mining property as the Cantu, or to sell its stock and obtain money for the purpose of developing and operating such a mine. It is only when a plan so conceived is formulated with a fraudulent intent to defraud investors and to deprive them of their money or property through false pretenses or representations, that a plan comes within the condemnation of the statute."

XXX.

The Court erred in refusing to give to the jury defendant's requested instruction No. 29, reading as follows:

> "In connection with any testimony in this case tending to show that the defendant represented that the stock in Cantu Mining Company would be sold at fifty cents a share, later at seventy-five cents a share, and later at a dollar a share, and that it was planned later to list it on the stock exchange in Seattle and Vancouver, you are instructed that if, by reason of the investigation which the defendant made of the worth and the value of the Cantu mining properties and the data and information which he received concerning the said property, he believed that the Cantu mining properties had sufficient value to warrant the sale of stock at such prices, and that the stock did have and would have such value, or if you have reasonable doubt in your mind but that the defendant so believed, then I instruct you that you will find the defendant Not Guilty of any count of the indictment by reason of any representations made concerning the value of said stock."

XXXI.

The Court erred in refusing to give to the jury defendant's requested instruction No. 38, reading as follows:

"You are further instructed that, although you may find that the defendant Wolfle was guilty of negligence and carelessness, and that he merely assented [57] to the mailing of certain letters, pamphlets, or literature, admitted as evidence in this case, you are instructed that he is guilty of no crime under the Postal Act charged in this indictment. Under the statute upon which the criminal charges here are predicated, there must be some form of overt act by the defendant Wolfle, the doing or saying of something that either directly or indirectly contributes to the criminal act, some form of demonstration on his part that expresses affirmative action and not mere approval, silence or acquiescence, which is all that is implied in assent. To assent to an act implies neither contribution nor an expressed concurrence, it is merely a mental attitude, which, however culpable from a moral standpoint, does not constitute a crime, since the law cannot reach opinion or sentiment."

XXXII.

The Court erred in refusing to give to the jury defendant's requested instruction No. 45, reading as follows:

"You are further instructed in connection with certain evidence admitted in this case that if you find that the representations complained of, however, were not false in fact and were

only false as the result of a legal inference, only false as the result of implication, then in that event you are instructed that you must return a verdict in favor of the defendant."

XXXIII.

The Court erred in refusing to give to the jury defendant's requested instruction No. 50, reading as follows:

"If you find from the evidence in this case that certain specific letters were mailed to witnesses who have appeared in this trial and that these letters related solely to particular transactions that were not part of the general scheme as alleged in the indictment for the purpose of defrauding investors generally, then you are instructed that even though you find that this particular letter and transaction may have been dishonest in some way other than that alleged in the indictment, then in that event you must return a verdict of not guilty."

XXXIV.

The Court erred in refusing to give to the jury defendant's requested instruction No. 55, reading as follows: [58]

"You are instructed that if you find from the evidence in this case that letters were deposited in the United States mail that were or were not signed by the defendant Wolfle, that this does not create any presumption that

the defendant Wolfle mailed the letters or authorized the mailing of them, and this is true even though the signature of the defendant Wolfle may appear and be admitted in specific letters. You, of course, understand that the mailing of such letters may be proven either by direct or circumstantial evidence, but there must be clear and convincing evidence before you can convict the defendant, that the letter was either mailed by him or that he did some act or group of acts on which the fact that the accused mailed the letter or letters, or caused them to be mailed, can be hinged, and if you have a reasonable doubt upon this matter you must resolve that doubt in favor of the defendant and render a verdict of not guilty."

XXXV.

Thereafter, within the time limited by law and the order and rules of this court, said defendant moved for a new trial and for an arrest of judgment, which motions were by the court overruled and an exception allowed as to each of said motions, which ruling of the court the defendant now assigns as error.

XXXVI.

And the court thereafter entered judgment and sentence against said defendant, upon the verdict of guilty rendered upon said indictment, to which ruling and judgment and sentence the defendant

excepted, and now the defendant assigns as error that the court so entered judgment and sentence upon the verdict.

XXXVII.

The trial court erred in refusing to grant motion of defendant, Conrad Wolfie, for a directed verdict at the close of the Government's case. [59]

XXXVIII.

The trial court erred in refusing to grant motion of defendant, Conrad Wolfie, for a directed verdict at the close of all the evidence.

And as to each and every of said assignments of error, as aforesaid, the defendant says that at the time of making of the order or ruling of the court complained of the defendant duly excepted and was allowed an exception wherever the same appears in the record to the ruling and order of the court.

WETTRICK, WETTRICK & FLOOD,
H. S. GARVIN,
Attorneys for Defendant.

Copy received this 15th day of April, 1932.
TOM DE WOLFE,
Asst. United States Attorney.

[Endorsed]: Apr. 16, 1932. Ed. M. Lakin, Clerk.
[60]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

Upon the petition for appeal of the defendant Conrad Wolfle, the assignments of error having heretofore been filed by the said defendant, it is

ORDERED, that the appeal be and the same hereby is allowed.

Done in open Court this 16th day of April, 1932.

JEREMIAH NETERER,
United States District Judge.

[Endorsed]: Filed Apr. 16, 1932. Ed. M. Lakin, Clerk. [61]

[Title of Court and Cause.]

APPEAL AND BAIL BOND.

KNOW ALL MEN BY THESE PRESENTS, that I, Conrad Wolfle, as principal, and New Amsterdam Casualty Co., a corp., as surety, are held and firmly bound unto the United States of America, plaintiff herein, in the penal sum of $5,000.00, lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

The condition of this bond is such that, whereas the said defendant was tried on the 11th day of

January, 1932, and sentenced March 21st, 1932, in the above-entitled cause as follows:

On Count	I	Four years	and	fine	$250.00
On Count	II	"	"	"	$250.00
On Count	III	"	"	"	$250.00
On Count	IV	"	"	"	$250.00

said sentences to run concurrently.

AND WHEREAS the said defendant has sued out an appeal from the sentence and judgment in said cause to the Circuit Court of Appeals of the United States for the Ninth Circuit, and whereas, the above-entitled court has fixed the defendant's bond, to stay execution of the judgment in said cause in the sum of $5,000.00,

NOW, THEREFORE, if the said defendant Conrad Wolfle shall diligently prosecute his said appeal, obey, abide by and [62] render himself amenable to all orders which said Appellate Court shall enter herein, and shall render himself amenable to and obey all process issued or ordered to be issued by said Appellate Court herein, and shall perform any judgment entered, and shall not leave the jurisdiction of this court without permission first granted and shall abide by and obey all orders entered by the District Court of the United States for the Western District of Washington, Northern Division, and shall, pursuant to any order issued by said District Court, surrender himself and obey and perform any judgment entered herein by the said Circuit Court of Appeals or the said District

Court, then this bond shall be void; otherwise remain in full force and effect.

Sealed with our seals and dated this 15th day of April, 1932.

CONRAD WOLFLE,

Principal.

[Seal] NEW AMSTERDAM CASUALTY CO.,

Surety.

By A. F. KEES,

Attorney in Fact.

Approved:

TOM DEWOLFE,

Asst. United States Attorney.

Approved:

NETERER,

United States Judge.

[Endorsed]: Filed Apr. 16, 1932. Ed. M. Lakin, Clerk. [63]

[Title of Court and Cause.]

ORDER EXTENDING TIME FOR LODGING AND FILING BILL OF EXCEPTIONS HEREIN AND EXTENDING THE TERM OF COURT THEREFORE, AND CITATION.

And now upon the stipulation of plaintiff and defendant, by their respective counsel, filed this day, that the defendant Conrad Wolfle may have an extension of time up to and including the 20th day of Sept., 1932, within which to lodge and file his bill of exceptions herein and that the present term of court and citation be so extended,

NOW, THEREFORE, IT IS HEREBY ORDERED that the defendant, Conrad Wolfle, may have up to and including the 20th day of September, 1932, within which to lodge and serve his proposed bill of exceptions herein, and that the November 1931 term of court and citation be and hereby is extended to and including Sept. 20, 1932, for such purpose.

Dated this 15th day of June, 1932.

EDWARD E. CUSHMAN,
United States District Judge.

[Endorsed]: Jun. 15, 1932. [64]

[Title of Court and Cause.]

ORDER EXTENDING TIME FOR SETTLING BILL OF EXCEPTIONS AND TERM OF COURT THEREFOR.

And now upon the stipulation of plaintiff and defendant, by their respective counsel, filed this day, that defendant Conrad Wolfle may have an extension of time up to and including the 3rd day of October, 1932, within which to settle his bill of exceptions herein and that the present term of Court be so extended,

NOW, THEREFORE, IT IS HEREBY ORDERED, that the defendant, Conrad Wolfle, may have up to and including the 3rd day of October, 1932, within which to lodge and present his proposed bill of exceptions herein, and that the November 1931 term of Court be and hereby is extended to and including October 3rd, 1932, for such purpose.

Dated this 20th day of September, 1932.

EDWARD E. CUSHMAN,
United States District Judge.

Received a copy of the within Order this 20th day of Sept., 1932.

ANTHONY SAVAGE,
Attorney for Plaintiff.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, Sep. 20, 1932. Ed. M. Lakin, Clerk.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Sep. 21, 1932. Ed. M. Lakin, Clerk. [65]

[Title of Court and Cause.]

HEARING ON SETTLEMENT OF BILL OF EXCEPTIONS.

Now on this 3rd day of October, 1932, Tom De Wolfe, Assistant United States District Attorney, appearing for the plaintiff and Attorneys Flood and Garvin appearing for the defendant, this cause comes on for settling bill of exceptions and the same is discussed pro and con with counsel for the government objecting to the bill. Whereupon said matter is continued over two weeks for the government to present further law or lodge proposed amendments. [66]

[Title of Court and Cause.]

PROPOSED BILL OF EXCEPTIONS.

BE IT REMEMBERED that heretofore, on the 12th day of January, 1932, the above-entitled cause came regularly on for trial in the above-entitled Court, before the Honorable Edward E. Cushman, one of the Judges of said Court, sitting with a jury at Seattle, Washington. The plaintiff appeared by Anthony Savage, United States District Attorney, and Tom DeWolfe, Assistant United States Attorney. The defendant appeared by Wet-

trick, Wettrick & Flood and H. Sylvester Garvin, his attorneys. A jury having been impaneled and sworn, and an opening statement made on behalf of the plaintiff by the District Attorney, the opening statement on behalf of the defendant having been reserved, and thereupon the following proceedings were had and tesimony taken during the course of said trial, to-wit: [67]

TESTIMONY OF GEORGE H. KIMBALL FOR THE PLAINTIFF.

GEORGE H. KIMBALL,

a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination
by Mr. DE WOLFE.

Q. Who is Mrs. Lena Hardigan?

A. Mrs. Lena Hardigan is a friend of mine; she is an old lady probably about 67 years old.

Mr. GARVIN.—Now, if Your Honor please, there is no question before the witness.

The COURT.—Sustained.

Mr. GARVIN.—I move it be stricken.

The COURT.—The last statement regarding the age of Mrs. Hardigan, will be stricken and the jury are instructed to disregard it.

Q. Did you talk to her about this stock?

A. I did.

(Testimony of George H. Kimball.)

Q. Do you know the defendant, Wolfle's, signature?

A. I do.

Q. (indicating). Is that his signature? On Exhibit 99?

A. Yes.

Mr. DEWOLFE.—I offer Exhibit 99 in evidence.

Mr. GARVIN.—It is objected to as incompetent, immaterial, not binding upon this defendant. There is no showing [68] the letter was mailed at the request of the defendant or by or under his authority or that it was ever mailed.

The COURT.—The objection is overruled. Is this a count letter?

Mr. DEWOLFE.—No, Your Honor.

Mr. GARVIN.—Exception.

The COURT.—Allowed. It will be admitted.

Government's Exhibit No. 99, the letter last above referred to, admitted in evidence and made a part of the record herein.

Mr. DEWOLFE.—(Reads Government's Exhibit 99 to the Jury.)

Q. Did you get any dividends on your stock?

A. No, sir.

Mr. GARVIN.—There are other marks on there.

Mr. DEWOLFE.—Sure.

Mr. GARVIN.—Read them (referring to exhibit).

Mr. DEWOLFE.—(Concludes reading of Exhibit 99.)

(Testimony of George H. Kimball.)

Q. Will you state whether or not you received any dividends?

A. I did not.

Mr. DEWOLFE.—That is all. [69]

TESTIMONY OF GRACE SNYDER, FOR THE PLAINTIFF.

GRACE SNYDER,

a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Mr. SAVAGE.—If Your Honor please, the Government desires to make an offer of proof and, in order to not prejudice the defendant, I think it should be made in the absence of the jury. We have this witness and Mr. Swenson. I think we can complete by noon—I think we can get through by that time, if your Honor passes upon it prior to 12:00 o'clock.

The COURT.—There is no necessity to take the jury out now and bring them back.

Mr. SAVAGE.—We can put Mr. Swenson on now and Mrs. Snyder on as the last witness. I think that would be more convenient.

(Mr. Swenson is put on the stand and the cross-examination is interrupted as follows):

The COURT.—The trial will be interrupted at this point, except as to the offer of proof on the

(Testimony of Grace Snyder.)

part of the prosecution. The jury is excused until 2:00 o'clock.

(Admonition.)

(The following in the absence of the jury.)

The COURT.—Have the jurors all left the room, Mr. Rock?

Bailiff ROCK.—Yes, Your Honor.

The COURT.—You may proceed.

Mr. DEWOLFE.—Your Honor, we offer to prove by Mrs. Snyder that between the 14th and 15th of June, 1929, the defendant dictated to her a letter to his wife. We offer to show this by her shorthand notes, taken at the time of the dictation; and, we offer to show also the letter was transmitted in the usual course to the wife by the stenographer.

The COURT.—Any objection? [70]

Mr. DEWOLFE.—And I have here (indicating) a copy of what the shorthand notes will set forth, and is offered as an admission and to show the state of mind and intent, if any, the defendant had.

The COURT.—I still understand the offer to show it by Mrs. Snyder, you are not offering to show it by that transcript? Is there any objection?

Mr. GARVIN.—May we look at the letter, if Your Honor please, first?

The COURT.—That would seem to be the shorter course to pursue, because your offer, up to this time has just been—not to offer he said any particular thing, just he wrote his wife?

(Testimony of Grace Snyder.)

Mr. DEWOLFE.—In connection with the offer, I would like to read to Your Honor this letter and assure Your Honor that we will show by the testimony of Mrs. Snyder, that the letter was to this effect, taken from her notes made at the time (reading): "To Mrs. Wolfle, 738 East 23d Avenue, Spokane. Dear Madeline: I received your letter and the newspaper clippings and I was also pleased to see the program of Virginia's little party; it was very good; I am proud of Virginia. I suppose you want to know whom I have for a Doctor and what he is doing. He is a young fellow by the name of 'Ash'—he studied at Mayo's in Rochester for many years; I rather like the chap; he is clean and good; seems to know his business and is right up to the minute. After examining and photographing and every other darn thing for five or six weeks, this is what he told me today:

"He showed me all the pictures and properties of my heart and blood pressure and everything. Nothing wrong. My stomach is as good as ever; I can eat cross-cut saws, but he tells me to eat more of mornings and very little of evenings; kind of divide up the three meals a day. My blood pressure is absolutely [71] perfect; he also tells me I have lived a very clean life.

"They took a test of my blood and everything else; my heart action is slow, due to the fact that I am very nervous. There seems to be four parts in the heart, two upper and two lower parts, and

(Testimony of Grace Snyder.)

the nerve centers between these parts are what they call 'Eagle eyes' and by looking at the chart, you can see where, on the left side, it works first just like a pump, then instead of shooting right through to the right side, it holds it; before the pressure gets on the right side of the heart, it forces the blood through the systoles.

"Now, he has given me some dope today, the first time—take a little every day and he is going to watch; he said the finest thing to do was to go away and leave business, take a long rest and watch my diet and not overeat and says I will be good for another forty years. I told him 'All right, you leave your business and I will leave mine and we will go away together.' He says he cannot do it; I says 'I cannot, either'—so, I will stay on the job, because this Cantu Mine, by God, has to be financed. It has been going very slow but we are all working and we are going to succeed. I talked to a banker the other day; he said 'You have done as much as most people do in two years.' He says 'It is a hard time to break in,' but I am going to break in and whenever I do, I am going to rob every last one of them blind, you bet your last bottom dollar. As ever——"

The COURT.—Any objection?

Mr. GARVIN.—We object to it as incompetent, irrelevant and immaterial, not made in pursuance to any plan; confidential, not within the confines of the charge as set forth in the indictment.

(Testimony of Grace Snyder.)

The COURT.—The objection is overruled. He will be allowed to show that, if he can. [72]

Anything further before the Court recesses? If not, Court will be adjourned until 2:00 o'clock this afternoon.

(Adjournment.)

Tuesday Afternoon, January 26th, 1932.

The COURT.—Is the call of the jury waived?

COUNSEL.—Yes, Your Honor.

The COURT.—Let the record show the jurors are all present. Call your next witness.

Mr. DEWOLFE.—Your Honor, I would like to call Mrs. Snyder and interrupt the cross-examination of Mr. Swenson, due to the fact that she is employed in a law office here and it will help her out if she is called at this time.

The COURT.—If there is no objection, you may do so.

GRACE SNYDER, recalled.

Direct Examination
by Mr. DeWolfe.

Q. I hand you, for your use, Mrs. Snyder, Government's exhibit marked 105 for identification, and ask you to state what that book is?

A. It is a stenographer's note book.

(Testimony of Grace Snyder.)

Q. Whose notebook?

A. Mine.

Q. Did the defendant dictate a letter to you to his wife about June 15th, 1929?

A. Yes. [73]

Q. Did you take the letter down in shorthand?

A. I did.

Q. Make the notes at the time?

A. Yes.

Q. Read the letter; read it out loud.

Mr. GARVIN.—It is objected to, if Your Honor please, as incompetent, and immaterial, not within the issues of the trial and it is a privileged communication between the husband and wife, and that it is in violation of the State's Statute, of Washington, Remington & Ballinger's Statute, 1214—that it is immaterial, that it brings in a collateral issue and is not within any of the issues alleged in the indictment; and for the additional reason, there is no proper foundation, and that it is secondary evidence.

The COURT.—Objection overruled.

Mr. GARVIN.—Exception.

The COURT.—Allowed. You will understand that you are asked to state just what the defendant said to you, as you can show by your notes, not anything that you furnished, if anything, that he did not say to you.

Q. Read it out loud, Mrs. Snyder, so we can hear it 'way back here.'

(Testimony of Grace Snyder.)

A. (reading from notebook). "Mrs. Wolfle, 738 East 23d Avenue." (I did not put Spokane, because I know Spokane.)

Mr. Wettrick. What is that? I did not hear that remark?

A. I did not have Spokane down here; I knew it was Spokane. (Continued reading.) "Dear Madeline: I received your letter and the newspaper clippings and I was also pleased to receive the little program of Virginia's little party. It was very good. I am very proud of Virginia. Now, I suppose you want to know——" [74]

Q. (interrupting). Louder.

A. (continuing). "——whom I have for a Doctor and what he is doing. He is a rather young fellow by the name of 'Ash.' He studied at Mayo's in Rochester for many years; I rather like the chap; he is clean and good; seems to know his business and is right up to the minute. After examining and photographing and every other darn thing for five or six weeks, this is what he told me today:

"He showed me all the pictures and properties of my heart and blood pressure and everything. Nothing wrong. My stomach is as good as ever; I can eat cross-cut saws, but he tells me to eat more of mornings and very little of evenings; kind of divided up the three meals a day. My blood pressure is absolutely perfect; he also tells me I have lived a very clean life.

(Testimony of Grace Snyder.)

"They took a test of my blood and everything else; my heart action is slow, due to the fact that I am very nervous. There seems to be four parts in the heart, two upper and two lower parts, and the nerve centers between these parts are what they call 'Eagle eyes' and by looking at the chart, you can see where, on the left side, it works first just like a pump, then instead of shooting right through to the right side, it holds it; before the pressure gets on the right side of the heart, it forces the blood through the systoles.

"Now, he has given me some dope today, the first time—take a little every day and he is going to watch; he said the finest thing to do was to go away and leave business, take a long rest and watch my diet and not overeat and says. I will be good for another forty years. I told him 'All right, you leave your business and I will leave mine and we will go away together.' He said he cannot do it; I says 'I cannot, either''— [75] so, I will stay on the job, because this Cantu Mine, by God, has to be finished. It has been going very slow but we are all working and we are going to succeed. I talked to a banker the other day; he said 'You have done as much as most people do in two years.' He said 'It is a hard time to break in' but I am going to break in and whenever I do, I am going to rob every last one of them blind, you bet your last bottom dollar. Yours as ever."

(Testimony of Grace Snyder.)

Mr. GARVIN.—The defendant moves this letter be stricken and the jury instructed to disregard it.

The COURT.—Motion denied.

Mr. GARVIN.—Exception.

The COURT.—Allowed.

Mr. DEWOLFE.—That is all.

Cross-examination
by Mr. Wettrick.

Q. What system of shorthand do you write?

A. Barnes—Pitman.

Q. And, you did not give the date of the letter?

A. I did not what?

Q. You did not mention the date of the letter?

A. The nearest date is the 15th, I find back a few pages, the 15th of June, 1929.

Q. 15th of what?

A. June.

Q. What is the date of the letter immediately preceding it?

A. There are several letters, quite a few before, I find that date preceding it.

Q. I am asking you what is the date of the letters?

A. That is one date—(searching through book) —June 15th, 1929. [76]

Q. Will you point out to me—let me see now, where is this letter you speak of?

(Testimony of Grace Snyder.)

A. Right here (indicating) "738 East 23d"—that is in figures.

Q. You are turning now four or five pages?

A. Yes.

Q. Six, seven, eight?

A. Until I find June 15th, it is back farther than that. (Searching through book.) June 4th—yes, June 4th.

Q. June 4th?

A. Yes.

Q. That is the next earliest date you have in the book?

A. Yes.

Q. And to whom was the letter of June 4th addressed?

A. There are a number of June 4th.

Q. Let's take the first one.

The COURT.—The first one, turning backward?

Q. The first letter on June 4th. She has dated June 4th.

A. J. Lester Maclin, Henry Building, Spokane, Washington.

Q. What is the date of the letter subsequent to the one that you read and show me that date? Before you do that,—you turned back about twenty pages, did you, before you found the date, June 4th?

A. I don't know how many.

Q. And was there no work done between June 4th and the 15th, except that which was done on

(Testimony of Grace Snyder.)

June 4th? In other words, Mrs. Snyder, were all those letters written on June 4th you have?

A. I don't know.

Q. You keep the dates on your letters?

A. Not each one. I put a date at the beginning of the day.

Q. That is the only date you have there?

A. Yes, that is the only date I have there. [77]

Q. Then you would say you wrote no letters between June 4th and 15th?

A. No, sir; I said June 15th—I was thinking this was on the 15th "Mrs. Madeline Wolfle" but this date is the only date before I find the next day preceding it is June 4th.

Q. What is the date of the letter you read?

A. I said June 4th is the only date preceding it.

Q. What is the date of the letter you read?

A. I don't know;—might have been a date—I did not put the date down; that was not my habit.

Q. In this particular date, it was what you did?

A. I don't know; it has been two years; I don't remember.

Q. That is exactly true. Do you find the date there?

A. June 4th is the only date I find before this letter.

Q. Between June 4th and the next date you have there are some 15 or 20 letters?

A. I have not counted them; there are quite a few.

(Testimony of Grace Snyder.)

Q. Now, what is the date? What is the next date you have in there and how many pages do you have to turn over to find the next date?

A. There must be another book; this is the beginning of book, May 23d—the next date is in the other book, my other shorthand book.

Q. Then you have only two dates in that book?

A. I have not looked; some days, I took lots of letters; some days, I did not take any.

Q. You have only two dates in that book?

A. I have not looked from the beginning.

Q. Didn't you look from the beginning.

A. I looked through the back; that was the front.

Q. Look through the back, also, please. [78]

A. Just a minute. (Searching through book.) No, sir; I find another date, May 23d, May 27th, 1929.

Q. What is the longhand that you see in there? Is that also dictation?

A. Yes.

Q. Are you in the habit of writing longhand and the Barnes-Pitman system interchangeably?

A. No, sir, that is a paragraph—looking to see how it would look before advertising.

Q. You put down?

A. No.

Q. Whose?

A. Mr. Wolfle.

Q. You put down?

(Testimony of Grace Snyder.)

A. No, sir; that is my writing.

Q. Also, find another date?

A. (Witness searches through the book.)

Q. The page you just turned over, you had a letter dictated by Mr. Cook; is that also dictated by Mr. Wolfle?

A. That is Mr. Wolfle's nephew.

Q. That is not dictated by Mr. Wolfle?

A. No, sir, I wrote there "dictated by Mr. Cook."

Q. Those are all the dates you find?

A. Yes, so far.

Q. Now, where was this notebook since you left the office?

A. At my home.

Q. At your home?

A. Yes.

Q. And when did you reread these notes last?

A. I don't remember; they have been—I don't remember; it was a long time ago, when I was instructed to go through those. [79]

Q. And you then furnished the information by reading these?

A. Yes.

Q. And when did you next see this book?

A. When I got them out of storage some time ago—I don't remember just what day.

Q. Out of your home?

A. Out of the basement, yes.

(Testimony of Grace Snyder.)

Q. And you have had them about a year and a half?

A. Something like that.

Q. During all of the time—you use these stenographic notebooks quite frequently?

A. That type?

Q. Yes.

A. I am not using that now.

Q. This is the only time you used this type?

A. You mean, shape and style?

Q. This notebook?

A. I used different kinds.

Q. You never used this any other place?

A. No, I never did use it any other place; I filled it in the office.

Q. Similar to this? You never used any place else?

A. I don't remember.

Q. You had these a year and a half at your home?

A. Yes.

Q. And, all this time, you were voluntarily going down to Mr. Swenson's office and giving him suggestions down there, is that not right?

A. No, sir.

Q. You say you never voluntarily?

A. No, sir; I said all this time, I have not; I have been too busy. [80]

Q. Within the last year and a half, since you had had the book?

(Testimony of Grace Snyder.)

A. In the early part of that time,—I have not been there for months and months.

Q. Early part of that time you went to Mr. Swanson's office frequently?

A. Yes, I was called.

Q. Voluntarily, too?

A. No, sir, except in answer to things I was supposed to get.

Q. You never went voluntarily?

A. No, sir.

Q. If Mr. Swanson said you did, that is not correct?

Mr. SAVAGE.—That is not proper cross-examination.

The COURT.—Sustained.

Q. And when did you transcribe the notes in the book?

A. I don't remember.

Q. For Mr. Swenson?

A. I did that some time last week.

Q. Last week?

A. Yes.

Q. And had you previously read it to Mr. Swenson?

A. Yes.

Q. You had taken the book down from your home to Mr. Swenson's office and read it to him?

A. No, sir, I don't remember; I don't know when I left the office and went by or when I took

(Testimony of Grace Snyder.)

the books home, I don't remember, it is too long ago.

Q. Didn't you take the books home immediately after the office closed in April 1930?

A. I don't know whether I took them home immediately or whether the Committee had them; I can't swear to it, when I took them home, Mr. Wettrick. [81]

Q. Then, you had them in your basement or your home for quite awhile?

A. Yes.

Q. Then, when did you tell Mr. Swenson about the contents in these private note books?

A. That one, I told him, as I said while ago, along early after the office was closed; I don't remember when it was.

Q. Then, having told him that, you took the book home again?

A. I had the books in a pile.

Q. You took them home again then?

A. Yes.

Q. And did you transcribe it for Mr. Swenson at that time?

A. I don't remember.

Q. Didn't you just transcribe it at home and take it down to him and say "Mr. Swenson, here is something that will help you"?

A. I don't remember; I don't think I did.

Q. You were very anxious, were you not, to help Mr. Swenson?

(Testimony of Grace Snyder.)

A. I was not anxious to help anybody; I was anxious to obey the Court.

Q. And when did you last have this before today?

A. The package? When I brought it down.

Q. I am not talking about the "package." When did you last have it?

A. It was in the package.

Q. Will you answer the question?

A. In the package—a week ago, yes, in the group, in the bunch.

Q. (indicating). Sorry I cannot read this.

A. I will get you somebody.

Q. Did you also tell Mr. Swenson early after you had left the office of the Cantu—also, tell him that you had a certain rubber stamp which he ought to know about, in order to get [82] the facts?

A. I don't remember anything about it.

Q. You knew about that, didn't you, though?

A. I had the rubber stamp?

Q. Yes.

A. Surely, I was instructed to keep it with the other things.

Q. You did not tell Mr. Swenson about that?

A. I think I told the Postal Inspectors what all I had; I was requested to.

Q. You told me when I called you up you did not know what you had?

(Testimony of Grace Snyder.)

A. Yes, I did not remember; I could have gone to the basement and looked it up but I was too busy. If you had asked me to, I might have.

Mr. WETTRICK.—That is all.

Redirect Examination.
by Mr. DeWolfe.

Q. Did you bring this book down when Mr. Wettrick demanded—and bring it in one package?

A. Yes.

Recross Examination.
by Mr. Wettrick

Q. Have you brought everything down now that belongs to Mr. Wolfe and the Cantu?

A. Yes, everything.

Q. Are you sure?

A. Yes, everything except that stapler; I cannot find it any place.

Q. And the typewriter? [83]

A. Yes.

Q. That is all?

A. Yes, that is all I remember.

Q. How much of that material that you had at your office, did you deliver to Mr. Pratt's office?

A. Not any of it.

Q. How much did he come and get?

A. None of it; he would not have gotten it.

The COURT.—This 105 has not been admitted in evidence; in whose custody is it?

Mr. DE WOLFE.—The Clerk's—and identified exhibit.

(Witness excused.) [84]

DR. WALTER KELTON,

having been first duly sworn, testified as follows:

Direct Examination
by Mr. Flood.

My name is Walter Kelton and I am a duly licensed and practicing physician in the state of Washington.

Mr. SAVAGE.—We will admit all that. The doctor is qualified.

A. I had occasion to examine Conrad Wolfle at the Moore Hotel, in his room. At the time of that examination he was in bed with a cold compress over his forehead and face. I asked him what his symptoms were and he told me that he got up this morning—but first of all he said that he had had a headache the night before and that upon getting up this morning he was quite dizzy and as he tried to go on the street alone he would almost turn around and he nearly fell over. I asked him if he had ever had any symptoms of that kind before and he told me that he had on two or three occasions, and that he had had an injury several years ago, a blow on the head necessitating his being placed in a hospital for about ten days. He told me that he had a feeling of numbness in his left

(Testimony of Dr. Walter Kelton.)

arm, and that he could hardly move the left arm; that he was not sure of it when he was going to move it and he would try to move it and would find himself catching hold of it with his right hand and lifting it over. I found that he had a bounding, full pulse. I did not have my blood pressure apparatus with me, but I am quite sure from his pulse, the character of it, that he had a high blood pressure. He is the type of man that develops it [85] quite frequently. At any rate, with a history such as this, we are bound to consider that. The man was possibly seriously ill. I would not let a member of my family go out and attempt to do any duty of any kind. I would not let him get up in an elevated posture, if it was possible to avoid it. It is my judgment that this man is ill and not in condition to be in court. I think he has had a slight stroke. I think he has a little hemorrhage possibly in the brain at this time. I examined his heart, but there isn't anything that I could feel sure about with reference to his heart from the superficial examination which I made; but I would have to discredit him, pay absolutely no attention to the history of this sort of if I did not conclude that he was not able to be up and about.

Q. Did you predicate your opinion on subjective symptoms or were there any objective symptoms confirming it?

A. I mentioned the objective symptoms, bounding, full pulse, which means that his blood pressure

(Testimony of Dr. Walter Kelton.)

is pretty high. I told him I thought he ought to be in bed for several days.

Q. Do you think he could be in court here?

A. I don't think so. He told me he was going to try. He told me he was going to be here this afternoon and I told him, "You won't be in court or anywhere else with my permission."

Cross-examination
by Mr. Savage.

Q. When you made your examination was he in bed, doctor?

A. No. I did not make him get up in the course of the [86] examination. The only objective finding that I made was the bounding or full pulse. The other symptoms were subjective findings upon complaints that he made to me. This bounding pulse does not necessarily indicate that he had high blood pressure. This pulse might be due to nervousness, but he didn't seem to be nervous at all, although he could have been nervous without displaying it in any other manner except by this bounding or full pulse. Worry over the outcome of a trial which meant a great deal to him might be the cause of this full pulse, but as a rule when a patient is nervous there is normally a strong pulse. This man had a very bounding full pulse, such as we find in the character of condition I have indicated.

Q. If this blood pressure, the systolic, was 106, would you consider that high?

(Testimony of Dr. Walter Kelton.)

A. That is very high blood pressure. I did not take his temperature, and there was no way for me to make any other analyses or tests; neither did I take a sample of his urine and make an analysis of it.

Q. So might the only objective finding which you did make be due to a mental condition, that is a nervousness or apprehension?

A. Yes, it could be. Before I can answer as to how long he will be confined to his bed I will have to go back and follow up the condition that seems apparent at this time. I cannot give an opinion at the present time, but if my estimation of his condition is correct I should say that it would be several days before he could safely go ahead. I did not ask him when he retired last night. I do not know that it would have any effect upon his condition if he retired late, [87] such as midnight or later, if he got his full quota of sleep. However, I do recall that he told me that he did not sleep well last night.

Q. Doctor, do you realize the stage which this case has reached, the point which it has reached, that testimony is no longer required, that he would not have to take the witness stand; all he would have to do would be to sit here and listen to the argument.

Mr. FLOOD.—I object to that as incompetent, irrelevant and immaterial, assuming something that may not necessarily be true. We are still in the

(Testimony of Dr. Walter Kelton.)

trial of this case and he is subject to all the vicissitudes, whatever they may be.

The COURT.—Objection overruled. You can bring out anything further on your direct.

A. It wouldn't make any difference to me, Mr. Savage, at all where he had to be, if he had to be in an erect position; if he had to make any exertion at all, I would say from my interpretation of his condition that it would be unsafe for him to be up anywhere, even up in his room.

Mr. SAVAGE.—Q. Would you say that even without taking his blood pressure, doctor?

A. Well I—well lots of times we are placed in predicaments where it is just impossible to make a full and complete examination. As I say, I would follow this up, but I think the man has a right to have this thing done. I think he has a right to have this done. I gave him some medicine or sent some medicine up to him and I am going back this afternoon or in the morning and take his blood pressure, take a bottle along for a sample of urine and I am going to make a full and complete examination that would help me to [88] judge the question of whether or not he was to be laid up for a long time. I have seen cases just exactly like this by men, working men, and I have urged them not to go ahead, and I might mention a name that would be well-known and of a man who just passed away within the last few weeks. I had urged him not to go ahead with his work. I have also seen cases of

(Testimony of Dr. Walter Kelton.)
exactly the same type that went ahead and nothing happened to them. A doctor has to give the benefit of the doubt to cases of this kind. In this case of course I am compelled to rely very largely upon statements which he himself made, but I do not believe this man could tell me the symptoms that he had as accurately as he did unless he was acquainted with medicine. He would have had to supply it out of a text book or have had somebody tell it to him, or urged him to make the statement that he did; and he did not make these statements as if he had been instructed to do so, but they were pulled out of him in the course of my examination and in questioning him as to his condition.

Redirect Examination.
by Mr. Flood.

Q. Doctor, does a numbness of the left arm such as you observe indicate any organic cerebral lesion?

A. Well it doesn't exactly indicate it; it is suggestive of it. If such a lesion occurred it would be on the opposite side. I did not observe any findings which would establish an organic lesion of that character or which would tend to establish such a lesion, as distinguished from malingering on the part of the patient, and I look for that always in any kind of an injury case, I look for malingering but this man wanted [89] to get up though according to his own statement, and come down here

(Testimony of Dr. Walter Kelton.)

this afternoon. He said, "I think, this trial is nearly over and I want to get it over with." I said, "You can't do it; you can't go this afternoon." If his condition is improving I am not able to say whether I would permit him to appear here tomorrow morning as I would have to take my blood pressure apparatus and everything and go and make a complete examination, get laboratory findings and everything. In my opinion, medically, it would entail an element of danger for him to appear this afternoon and continue with the trial. I would give him the benefit of the doubt.

The COURT.—Q. What difference is there in his being here or being in the hotel in bed?

A. Well anything that is apt to excite him at all, anything that is apt to shoot the blood pressure up the slightest bit.

Q. Isn't the dread and uncertainty of this case fully as liable to excite him as to have the matter over with?

A. I hardly think so. I gave him some morphine and instructed him to stay flat on his back, not to get up at all, remain in bed in the quiet of his room. Now I think that that is the better procedure. I would not advise you to come down here and sit in a case and hear it in a reclining posture. I wouldn't advise you to come down here and try a case in the same condition. I wouldn't think of doing such a thing unless I was absolutely sure of every point that is necessary to be considered be-

(Testimony of Dr. Walter Kelton.)

fore passing an ultimate opinion. Anything is liable to raise the blood pressure.

Mr. SAVAGE.—Q. Doctor, is your chief concern over the blood pressure at the present time? [90]

A. Well my chief concern is over the hemorrhage that I think he has had in his brain; and if he has a high blood pressure, which I believe he has, it would increase the tendency to further hemorrhages.

Q. Well, assuming that his blood pressure was only 106, would that change your opinion at all?

A. Yes, that would change my opinion. In that case my opinion would be that he would be far less liable to have further hemorrhages, that is assuming that he has had a hemorrhage now.

The COURT.—Q. You have reached the conclusion that he has had a hemorrhage merely by what he told you and your conclusion that he did have high blood pressure, without testing it?

A. Well, the fact that he has had a blow on the head and has had similar symptoms before and was once hospitalized for eight or ten days—now that is his history—and if that is true then I would have to discard some of the other things and possibly alter my opinion altogether.

Mr. FLOOD.—Q. This condition, doctor, could be a post traumatic condition?

A. Yes.

Q. Is it one such as, from the history you have had, you would consider a post traumatic condition?

(Testimony of Dr. Walter Kelton.)

A. Yes.

Q. Resulting from a blow on the head?

A. Yes.

Q. Where do you think the original cerebral lesion occurred, under the history you have and the observation that you made? [91]

A. At the time when he received the blow on the head over in the mountains somewhere in the middle west.

Q. And you think the condition such as you found is the recurrence of hemorrhage or is it a secondary after affect of the original hemorrhage? In other words, is there a repetition of hemorrhage there?

A. Well, you are asking me to say a whole lot on an essentially superficial examination, which I don't like to do. I realize the gravity of the situation, the importance of this man's appearance in court this afternoon and if I could find a reasonable excuse for permitting him to come I certainly would do so; but I think that it is the duty of a doctor to give a man like this the benefit of the doubt. He gave me a history of having had a headache all night last night; he had a cold compress over his head this morning, and he looked to me to be a sick man. He kept rubbing his left hand this way and rubbing it all the time. He didn't know that I knew anything about what that meant in these old men. He gave me a history of having been examined two weeks ago by Dr. Irwin of

(Testimony of Dr. Walter Kelton.)

this city but of course he did not know what Dr. Irwin found. He also gave me a history of a condition similar to this about two months ago in Spokane and of having been examined by a doctor, whose name I forget. This I believe was about two months ago, I think he gave me a history of at least three or these spells. I don't know the exact time, but a short time ago, a few weeks ago. And another was I think in Montana. As far as the safety of the patient is concerned, I think it would be unwise to go ahead with him here this afternoon or at least until we have had an opportunity to fully study out his case. I don't know [92] that I am right, but I certainly think the man is entitled to that much consideration.

Mr. SAVAGE.—Q. Did you examine the pupil of his eyes?

A. I didn't have an ophthalmoscope to examine him. I just looked at them. I did not observe any irregularity. There would be some difference if he had had a serious hemorrhage. I did not test him to find out what his nervous reflexes were.

Mr. FLOOD.—Q. Doctor, the reflexes may or may not be of consequence in such a paralysis as you consider that he may have had?

A. Yes.

Q. What would your answer be to that, would the reflexes necessarily be conclusive?

A. They would not be conclusive, no. They would leave me just in the position I am in at the

(Testimony of Dr. Walter Kelton.)

present time. I think the man has a right to have a little further study before considering.

The COURT.—Q. Doctor, do you specialize in any particular branch?

A. General surgery.

Mr. FLOOD.—Q. Have you had any experience in diagnosing cases of cerebral hemorrhage and paralysis?

A. Oh, yes.

Q. Is it limited or has there been any extent of such practice?

A. Well I have had a great deal of experience with traumatic injuries. I was a medical director for the Department of Labor and Industries for years; and I am medical referee for several accident insurance companies and for the [93] city. I still am for the city and in such capacity I have occasion to examine injured men, I think about as many as any other doctor in Seattle.

(Witness excused.) [94]

DR. DON H. PALMER,

being first duly sworn as a witness in behalf of the Government, testified as follows:

Direct Examination
by Mr. Savage.

Q. Give the reporter your full name will you please.

A. Don H. Palmer. I am a duly licensed and practicing physician in the State of Washington. Have practiced here for the past twenty-five years. I specialise in general surgery. I met Conrad Wolfle this morning and made an examination of him in room 405 Moore Hotel about half past eleven, after Dr. Kelton had been there. I went over him from head to foot. I took his pulse, which was 70 and normal. His temperature was 96.3, which was about normal. His respiration was 18, which is normal. His blood pressure was diastolic 100 and systolic 175, which is a little erratic. His eyes reacted normally to light and accommodation; that is the pupils dilated and contracted as they normally should from light, and dilated and contracted as they normally should for distance and up close. When you look at a distance the pupil dilates and when you look up close it contracts. His eyes moved easily in all directions. He could follow your finger up or down, or when you came toward him his eyes will converge; no disturbance that I could elicit in his ears. He has a scar on his forehead, on the left side of his forehead, a

(Testimony of Dr. Don H. Palmer.)

slight scar where he said that he had been injured, struck over the head with a pipe some time back and said he was unconscious for approximately half an hour, and was disabled for about eleven days or thereabouts; eleven days he was in the hospital. His heart sounds are normal. His lung [95] sounds are normal. No disturbance I could find in his chest at all. His chest was normal. He has a large scar about seven inches long, the site of an abdominal operation, and he has a good sized hernia there. I tested out his knee jerks but his knee jerks are normal. Mr. Wolfe says he is dizzy when he stands up and he also told me that he had lost approximately forty pounds in weight in the last six weeks. It is quite evident that he has lost weight because his skin is loose. You can feel that there has been a loss of weight. He also stated that there was considerable disturbance in his urine, that is his urine was quite strong. I was unable to get a specimen of urine to examine. I tried to but was unable to procure it. He got up and said that he was dizzy as soon as he stood up. That of course you have to take his word for. It would not be beyond reason to find a condition in a man who has lost so much weight, who has gone through considerable worry to develop at this time an acidosis that might make him dizzy, but there is no evidence that I could find, no evidence of any paralysis. He seemed to be afraid of a paralysis but I found no evidence of any. In my opinion

(Testimony of Dr. Don H. Palmer.)

there would be no danger of his being up and about. He has got to have the discomfort of perhaps dizziness. I wouldn't say that he was not dizzy. There was no evidence that I could see of a brain hemorrhage. Of course you cannot see a brain hemorrhage. If a man has a hemorrhage of any size you will find manifestations that come from the hemorrhage, such as lack of consciousness, evidence of paralysis. That is progressive in character, starts involving a small area and continues to enlarge. It might, for instance, start with the knee and eventually involve the foot of the leg, [96] the side of the face, trunk. I did not find any evidence of paralysis in either of his arms but he stated he had a feeling of numbness in his left arm. However, he was able to move his left arm and I could find no disturbance of any of the reflexes in the left arm. I manipulated the fingers of his left hand. That is as far as I could go in my examination in the length of time that I had. I would like to have had a specimen of the urine to check over but I was unable to get it.

Q. In your professional opinion, could he attend the arguments of this trial without endangering his life or his health?

Mr. FLOOD.—I am going to object to this question—attend this trial—counsel seems to think it is merely argument.

Mr. SAVAGE.—Q. The remainder of the trial, we will put it that way, if counsel wants it that way.

(Testimony of Dr. Don H. Palmer.)

The COURT.—Overruled.

Mr. FLOOD.—Exception.

The WITNESS.—Well, what does he have to do?

Mr. SAVAGE.—I don't know that counsel will permit me to tell you. I may state that all the evidence is in at the present time and we are beginning the arguments in the case.

A. Well, he would just be an interested spectator, in other words.

Q. Yes, of an interested spectator, probably nothing but sit in his chair and listen to the arguments of counsel and the instructions of the Court and the verdict of the jury when it comes in.

A. I would not think that that would have any influence on his general health. I do not think the man feels up to [97] par, but I don't think anybody would under the circumstances.

Cross-examination
by Mr. Flood.

Q. You think that is a condition that just came on recently, doctor?

A. Yes.

Q. Your answer that it would do him no harm to be here is predicated upon your opinion that there is no numbness in the arm or a paralysis?

A. No, I wouldn't say that he didn't have numbness in his arm, but my interpretation for the numbness in that arm is due to the fact that he has been worried here, has lost in weight, and has not

(Testimony of Dr. Don H. Palmer.)

been following his usual routine, has not been drinking enough water, has not been eating enough sugar; he needs more fruit juices. That condition is not so uncommon. And that don't mean that a man is having a hemorrhage nor that he is going to be paralyzed, necessarily. I did not get the man is a distinct malingerer. I think he has some dizziness, that he is conscious of, but that is not uncommon at all.

Q. The blood pressure which you found of 175 diastolic is rather a higher blood pressure, is it not?

A. That is higher than it should be, yes.

Q. And it is 30 or 35 pounds higher than any insurance company would approve?

A. I don't think any insurance company would take him. I don't remember just what his age is.

Mr. SAVAGE.—His age is 61.

A. They don't usually take them over 60.

Q. Doctor, it is true, also, is it not, that the accident [98] which he suffered and the conditions which you found might be a post traumatic condition?

A. I don't think so. I inquired carefully into the character of the injury and the man who cared for him. There was no history of a skull fracture. The man was knocked out, in all probability, but that does not necessarily do anybody any harm to be knocked out. Boxers frequently are knocked out and it *does do* them any harm.

(Testimony of Dr. Don H. Palmer.)

Q. You think he can stand it at sixty years of age as well as a boxer? Is that your opinion?

A. Yes, but that produces unconsciousness. You have to observe with some considerable caution. You have to prove to yourself that there is no damage done.

Q. Now, if you had a case, doctor, where a man sixty years of age suffered a blow on the skull producing unconsciousness for a certain period of time, we will say for a half or three quarters of an hour, and that during that interim he was taken to a hospital and treated for concussion of the skull and kept there for a period of eleven days——

A. Concussion of the skull or concussion of the brain?

Q. Concussion of the brain, and kept there for a period of eleven days and treated in the usual manner, and then thereafter he returned to his home and was subsequently treated by his own personal doctors, including Dr. Alquist, the distinguished Dr. Alquist of Spokane, and Dr. Lewis of Spokane, and then he was examined by these doctors and was diagnosed as suffering from a post-cerebral hemorrhage and that he had acute spells of dizziness and staggering and headaches for three and four days, during which his doctors advised him to remain in bed on two occasions, that he then came to Seattle within a period [99] of a month after the last spell——

(Testimony of Dr. Don H. Palmer.)

The COURT.—No, no, but you don't in your assumption, you don't state the length of time this happened.

Mr. FLOOD.—The original injury having occurred in the fall, about the month of October, 1931, and the first subsequent spell having occurred a period of a month or six weeks later, and the following spell a period of a month or so later, and thereafter he came to Seattle early in January and resided——

The COURT.—Excuse me. You said 1931.

Mr. FLOOD.—Yes.

The COURT.—October, 1931, do you mean that?

Mr. FLOOD.—Yes, and he came to Seattle in January of 1932, this present year, and went through the process and the ordeals, such as they may be, of standing a trial wherein he is defendant and the United States of America is the plaintiff, and that a period of two weeks ago he had severe headaches and dizziness and complaints similar to those which he gave you when you examined him today, and that again today he suffered headaches and dizziness and complaints similar to those which you found and obtained from him when you examined him today, would you think, considering that under these circumstances his condition is such as you found it today, might be a post traumatic condition resulting from the injury received in the early fall of 1931?

(Testimony of Dr. Don H. Palmer.)

A. I don't believe that the condition that I found today has anything to do with his injury, that he is said to have sustained from the blow on his head with the gas pipe. Now, assuming that the man had a hemorrhage at that time and that he didn't have the difficulties that you have recited, that [100] would—the men who saw him at that time are best able to judge, and if a man like Alquist believed that there was a hemorrhage there, I think Alquist is a capable competent man and he would be able to tell a hemorrhage as well as Doctor Kelton or myself.

Q. Do you know Dr. Alquist?

A. Yes, I know Dr. Alquist. He is all right, but the diagnosis of a hemorrhage without more sustaining symptoms than have been presented, without any evidence of a skull fracture, without the evidence of any paralysis, is more or less a matter of supposition. In other words, you cannot take a photograph of the brain and find it. You must rely to a very large extent upon the symptoms reported by the patient himself.

Redirect Examination
by Mr. Savage.

Q. Doctor, assuming that the defendant retired last night about midnight, would that result in any of these findings which you found this morning; have any influence upon them at all?

(Testimony of Dr. Don H. Palmer.)

A. Might have some influence. I don't know what he was doing up to midnight. There are many things that might have happened up to midnight that would influence his condition in the morning.

The COURT.—Q. The dread and uncertainty of the case in which he is charged with a serious offense the question has to do now, the question we are concerned with here has to do with the condition of his health from continued worry, an uncertainty as compared with the risk he would run if he [101] comes here and has it over with in a couple of days?

A. I don't think it would make any difference whether he comes in this afternoon or tomorrow afternoon or next week.

Mr. FLOOD.—Q. And that, doctor, is your opinion in spite of the fact that you found a high blood pressure?

A. Yes. I don't think 175 blood pressure in a man 61 years of age means very much.

(Witness excused.)

DR. KELTON,

recalled as a witness in behalf of the defendant, testified as follows:

Direct Examination
by Mr. Flood.

Q. Doctor, does the testimony which you just heard from Dr. Palmer, whom you no doubt know, particularly the testimony with regard to the blood pressure of 100 systolic and 175 diastolic, change the opinion you expressed as to his condition?

A. It emphasizes my opinion that I just expressed. I know Dr. Palmer. He is one of my most intimate friends and I have regard for his opinion in all matters. It doesn't make any difference what the age is, a blood pressure of over 144, there is hardly an insurance company in America that will accept the individual, if he is 75 or 95. The fact of the matter is with the high blood pressure that he has it is dangerous for him to participate in any activity. As a matter of fact, from what I have heard, Your Honor, that this case has been going on for five weeks, I think the strain of the case upon him is very probably the cause of his present condition. I think that is just about what has brought it on. He has high blood pressure. That is all there is to it.

(Witness excused.)

Motion for continuance on the ground of defendant's illness was denied by the Court and exception taken by defendant and exception allowed.

[Endorsed]: Lodged in the United States District Court, Western District of Washington, Northern Division, September 20, 1932. Ed. M. Lakin, Clerk. By T. W. Egger, Deputy.

Received a copy of the within proposed Bill of Exceptions this 20th day of September, 1932.

ANTHONY SAVAGE,
Attorney for Plaintiff.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, October 17, 1932. Ed. M. Lakin, Clerk. By S. Cook, Deputy. [103]

[Title of Court and Cause.]

ORDER SETTLING BILL OF EXCEPTIONS.

The foregoing 36 pages truthfully set forth proceedings had upon the trial of the defendant, Conrad Wolfle, in so far as they are stated. In addition to the testimony set out in said 36 pages hereinabove, other testimony relevant to and tending to prove the guilt of the defendant with respect to the first four counts charged in the indictment herein, was introduced, received and considered, and the foregoing is hereby certified and allowed as a bill of exceptions, and as such is hereby certified and allowed.

It is further ordered that Government's exhibit number 99 be considered a part of this bill of ex-

ceptions and that the Clerk of this Court do transmit said original exhibit number 99 to the Clerk of the Circuit Court of Appeals for the Ninth Circuit in lieu of copy thereof.

Done in open Court this 17th day of October, 1932.

E. E. CUSHMAN,
United States District Judge.

[Endorsed]: Filed October 17, 1932. Ed. M. Lakin, Clerk. [104]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the above-entitled Court:

Will you please prepare and certify a transcript of the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, in the above-entitled cause, and include the following papers and proceedings:

1. Indictment.
2. Motions and demurrers, and Court's rulings thereon and Exceptions.
3. Motion for Continuance December 21st.
4. Affidavits of Moser, Jennings, and deWolfe.
5. Memorandum Decision denying continuance.
6. Written exceptions to above.
7. Plea.

8. Verdict and sentence.

9. Motion for new trial.

10. Motion in arrest of judgment.

11. Court's ruling denying motion.

12. Order of Court extending time to and including June 20, 1932, for lodging bill of exceptions and extending term of Court therefor.

13. Petition for appeal.

14. Notice of appeal.

15. Assignments of error.

16. Citation on appeal.

17. Order allowing appeal.

18. Bond on appeal. [104-a]

19. Order extending time for lodging and filing bill of exceptions and extending term of Court therefor to September 20, 1932.

20. Order extending time for settling bill of exceptions and term of Court therefor to October 3, 1932.

21. Bill of Exceptions.

22. Journal record of hearing on settlement of Bill of Exceptions October 3, 1932.

23. Order settling bill of exceptions.

24. Praecipe.

WETTRICK, WETTRICK & FLOOD,
805 Arctic Building, Seattle,
Washington,
Attorneys for Defendant.

Received a copy of the within Praecipe this 9th day of November, 1932.

ANTHONY SAVAGE,
Attorney for Plaintiff.

[Endorsed]: Filed November 9, 1932. Ed. M. Lakin, Clerk. [104-b]

[Title of Court and Cause.]

CERTIFICATE OF CLERK OF U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington.—ss.

I, Ed. M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify that this typewritten transcript of record, consisting of pages numbered from 1 to 105, inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause, as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court at Seattle, and that the same constitutes the record on appeal herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office or on behalf of the appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit, in the above-entitled cause, to wit: [105]

Clerk's fees (Act Feb. 11, 1925) for making record, certificate or return, 259 folios at 15c	$38.85
Appeal fee (Section 5 of Act)	5.00
Certificate of Clerk to Transcript of Record	.50
Certificate of Clerk to Original Exhibits	.50
	$44.85

I hereby certify that the above cost for preparing and certifying record, amounting to $44.85, has been paid to me by the attorney for the appellant.

I further certify that I attach hereto and transmit herewith the original citation on appeal issued in this cause.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the official seal of said District Court at Seattle, in said District, this 15th day of November, 1932.

[Seal] ED. M. LAKIN,
Clerk of the United States District Court
for the Western District of Washington,
By T. W. EGGER,
Deputy. [106]

[Title of Court and Cause.]

CITATION ON APPEAL.

The President of the United States of America, to the United States of America, and to Anthony Savage, United States Attorney for the Western District of Washington, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the City of San Francisco, within thirty (30) days from the 16th day of April, 1932, pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the Western District of Washington, Northern Division, wherein Conrad Wolfle is the appellant and the United States of America is the appellee, to show cause, if any there be, why the judgment in the said appeal mentioned should not be corrected and speedy justice should not be done on that behalf.

WITNESS the Honorable JEREMIAH NETTERER, Judge of the District Court of the United States for the Western District of Washington, Northern Division, this 18th day of April, 1932.

[Seal] EDWARD E. CUSHMAN,
United States District Judge.

Received a copy of the within Citation this 16th day of April, 1932.

TOM DEWOLFE,
Assistant United States Attorney.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Apr. 18, 1932. Ed. M. Lakin, Clerk. By S. Cook.

[Endorsed]: No. 7007. United States Circuit Court of Appeals for the Ninth Circuit. Conrad Wolfle, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed November 17, 1932.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit.

No. 7007

United States

Circuit Court of Appeals

For the Ninth Circuit.

CONRAD WOLFLE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

At a stated Term, to wit, the October Term, A. D. 1932 of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Thursday the twenty-third day of March in the year of our Lord One Thousand Nine Hundred and Thirty-three.

Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding, Honorable WILLIAM H. SAWTELLE, Circuit Judge, Honorable JULIAN W. MACK, Circuit Judge.

No. 7007

CONRAD WOLFLE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

ORDER OF SUBMISSION

ORDERED above cause argued by Mr. H. Sylvester Garvin, counsel for appellant, and by Mr. Anthony Savage, United States Attorney, counsel for the appellee, and submitted to the court for consideration and decision.

At a stated Term, to wit, the October Term, A. D. 1932 of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday the tenth day of April, in the year of our Lord One Thousand Nine Hundred and Thirty-three.

Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding, Honorable WILLIAM H. SAWTELLE, Circuit Judge, Honorable JULIAN W. MACK, Circuit Judge.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT.

By direction of the court, ORDERED that the typewritten opinion this day rendered by this court in above cause be forthwith filed by the clerk and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion filed.

[Title of Court and Cause.]

OPINION.

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Before: WILBUR, SAWTELLE and MACK, Circuit Judges.

WILBUR, Circuit Judge:

Appellant was convicted of using the mails to defraud in violation of §215 of the Criminal Code (18 U. S. C. A., §338). The only questions pressed on the argument are the correctness of the rulings of the court on the admission of the testimony of the witness Grace Snyder, and in denying a continuance at the conclusion of the testimony by reason of the illness of the appellant. The witness, Grace Snyder, testified that the defendant dictated to her a letter to his wife; that she took the dictation down in shorthand and that the letter contained the following reference to the Cantu Mine: "I am going to break in and whenever I do, I am going to rob every last one of them blind." Several objections were made to the introduction of this testimony, but the only one pressed in the argument is the objection that it is a privileged communication between husband and wife.

We think it clear that the statement of the husband to his stenographer is not privileged even though it was intended to be communicated to his wife. The

law protecting a spouse from the testimony of the other spouse does not extend to oral communications to third persons, even if intended for transmission to the other spouse. Appellant cites no case to the contrary. The quotation in the brief from Hammons v. State (Ark.), 84 S. W. 718, seems to support appellant's contention, but an examination of the case discloses that it tends to support the ruling of the trial court in the case at bar. That court said:

> "The authorities are practically agreed that when a conversation between husband and wife is overheard, it may be testified to by the third party." Citing, 1 Greenleaf on Evidence, §254; Comm. v. Griffin, 110 Mass. 181; Fay v. Guynon, 131 Mass. 31; Allison v. Barrow, Tenn. 91 Am. Dec. 291; State v. Center, 35 Ft. 378; Griffin v. Smith, 45 Ind. 366.

It is also held that a conversation is not privileged when made in the presence of third persons, citing Reynolds v. State (Ind.), 46 N. E. 31; Mainard v. Beider, 2 Ind. App. 115; Robbs Appeal, 98 Pa. 501.

The case at bar was tried in the United States District Court for the State of Washington, and in the absence of Federal legislation upon the subject the law of the territory of Washington at the time of her admission into the Union as a state controls in the trial of criminal cases in the Federal courts sitting therein. Rendleman v. U. S., 18 F. (2d) 27; Olmstead v. U. S., 277 U. S. 438, 466-7, 469; Tinsley v. U. S., 43 F. (2d) 890, 895.

The statute of the territory of Washington on the

subject of privileged communications between husband and wife was contained in §392 of the Code of 1881 and is now embodied in Hill's Statutes and Codes of Washington, §1649. It was derived from a similar code section in the State of California (Cal. Code Civ. Proc., §1881). That section of the California Code has been adopted in substantially the same form in all the states in this circuit (Oregon, §733 Ore. Laws 1920; Arizona, §4412 Struckmeyer's Rev. Code 1928; Nevada, §5424 Rev. Laws Nevada, 1912; Idaho, §7937, Idaho Comp. Stats. 1919; Montana, Rev. Code Mont. 1921, §10,536), and it has been uniformly held that the privilege does not extend to oral communications to third persons nor to written communications entrusted to or coming into the hands of third persons. With reference to these code sections thus adopted by the State of Oregon the Supreme Court of that state in State v. Wilkins, 72 Ore. 77, while recognizing that some courts have held that a written communication from the husband to the wife should be excluded as privileged "no matter into whose possession the communication, if in writing, may fall," also held that the authorities all agree that if oral communications between the husband and wife were overheard by third parties they may be given in evidence by the third party. The court also declined to follow the decisions of other states holding that the privilege extended to a writing between them which had come into the possession of third parties and decided that the purpose of the rule was to protect the speaker or writer from the testimony of the other spouse and that the privilege does not extend to communications

when disclosed to strangers. The same view was expressed by the Supreme Court of the State of Washington in an earlier case, State v. Nelson, 39 Wash. 221. In State v. Falsetta, 43 Wash. 159, it was held that the rule concerning privileged communications between husband and wife had no application to the testimony of a third person who overheard such communication. (See also State v. Rasmussen, 125 Wash. 176.) The same rule has been followed in California (People v. Chadwick, 4 Cal. App. 63, 72; People v. Swaile, 12 Cal. App. 192, 196). The same rule has also been followed in Arizona (Chas. De Leon v. Territory of Arizona, 9 Ariz. 161), and in Idaho as to communications between attorney and client (State v. Perry, 4 Idaho 224).

With reference to the denial of appellant's motion for continuance, it should be stated that at the conclusion of the evidence the appellant claimed to have suffered a slight apoplectic stroke. He was thereupon examined by two physicians who testified in court with reference to his condition. One of them testified that in his opinion the appellant had suffered a slight stroke. This opinion was based in part upon the statement of the defendant to this physician that he had a feeling of numbness in his left arm and that he could hardly move that arm. The other physician testified that in his opinion the defendant had not suffered a stroke, that he found no evidence of paralysis in the arms, and that in his opinion he could attend the balance of the trial without injuring his health. The court, under the circumstances, required the trial to proceed and the

appellant remained in attendance throughout the argument. No exception was taken to this ruling, and there was no abuse of discretion in it.

Appellant also presented in his brief an assignment of error based upon a denial of his motion for continuance some three weeks before the trial, but properly conceded on the argument that this court could not review the order because the matter was not included in a bill of exceptions (Beach v. U. S., 35 F. (2d) 839). Moreover, it appears from the affidavit which appellant has printed in the transcript that his claim of ill health was controverted by affidavits, and a ruling on that conflict adverse to the appellant cannot be reviewed.

Judgment affirmed.

[Endorsed]: Opinion. Filed Apr. 10, 1933. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 7007

CONRAD WOLFLE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL from the District Court of the United States for the Western District of Washington, Northern Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the District Court of the United States for the Western District of Washington, Northern Division, and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

[Endorsed]: Filed April 10, 1933. Paul P. O'Brien, Clerk.

At a stated Term, to wit, the October Term, A. D. 1932 of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday, the nineteenth day of June in the year of our Lord One Thousand Nine Hundred and Thirty-three.

Present: Honorable WILLIAM H. SAWTELLE, Circuit Judge, Presiding, Honorable FRANCIS A. GARRECHT, Circuit Judge.

[Title of Cause.]

ORDER DENYING PETITION FOR A REHEARING.

Upon consideration thereof, and by direction of the court, IT IS ORDERED that the petition of appellant, filed May 9, 1933, for a rehearing of above cause be, and hereby is denied.

[Title of Court and Cause.]

MOTION TO STAY ISSUANCE OF MANDATE.

Now comes CONRAD WOLFLE, the appellant in the above-entitled court, by his attorneys, and represents, petitions and moves:

I.

Appellant is filing his application to the Supreme Court of the United States for a writ of certiorari for the review of the judgment of this court filed herein on June 19, 1933.

II.

Under U. S. Code Ann. Title 28, Sec. 350, such application will not operate to stay the mandate or other process except by special order of the court; and under Rule 32 such mandate or other process will issue, as of course, after the expiration of five (5) days from the date of the order denying the petition for rehearing herein, unless otherwise ordered.

III.

In view of the nature of such application for a writ of certiorari to the Supreme Court of the United States and the end sought to be accomplished thereby, no useful purpose would be subserved if the mandate or other process of this court should issue before the court has disposed of such petition, but would cause unnecessary complication, delay and hardship.

IV.

That in the judgment of your petitioner, the decision of the Circuit Court of Appeals conflicts on an important question of local law with the applicable

decisions, and deprives the petitioner of a privilege granted by local statute and by the common law, and has so far departed from the course of judicial proceedings and construction as to call for the exercise of the power of supervision of the Supreme Court.

V.

Appellant moves and prays for an order staying the mandate herein until August 30th, 1933, to enable him to prepare and present his application for the writ to the Supreme Court.

Dated at Seattle, Washington, June 21, 1933.

WETTRICK, WETTRICK & FLOOD,
H. SYLVESTER GARVIN,
Attorneys for Appellant.

[Title of Court and Cause.]

ORDER STAYING MANDATE.

On motion of counsel for appellant, the petitioner in the above-entitled cause, and good reason appearing therefor,

It is now here ORDERED, that the issuance of the mandate of this court in the above entitled cause be and the same is hereby stayed pending application by the appellant to the Supreme Court of the United States for a writ of certiorari, provided said application is made on or before August 15, 1933.

Dated this 23 day of June, 1933.

WM. H. SAWTELLE,
U. S. Circuit Judge.

[Endorsed]: Filed June 23, 1933. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 7007

CONRAD WOLFLE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

CERTIFICATE OF CLERK U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, PAUL P. O'BRIEN, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred and forty-six (146) pages, numbered from and including 1 to and including 146), to be a full, true and correct copy of the entire record, excluding original exhibits, of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellant and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 3rd day of August, A. D. 1933.

(Seal) PAUL P. O'BRIEN,

Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 16, 1333.

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted, limited to the question as to what law is applicable to the determination of the question of privilege which was raised at the trial. The case is advanced and assigned for argument immediately following No. 394 on Monday, November 13 next.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Supreme Court of the United States

OCTOBER TERM, 1933

No.....

CONRAD WOLFLE, Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable Charles E. Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States.

S. J. WETTRICK,
WETTRICK, WETTRICK & FLOOD,
H. SYLVESTER GARVIN,
Attorneys for Petitioner.

805 Arctic Bldg., Seattle, Wash.

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Supreme Court of the United States

OCTOBER TERM, 1933

No.....

CONRAD WOLFLE, Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable Charles E. Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States.

PRAYER.

The petitioner, Conrad Wolfle, prays that a Writ of Certiorari issue to review the decree entered on April 8, 1933, by the United States Circuit Court of Appeals for the Ninth Circuit (R. 139), after which a petition for rehearing was denied on June 19, 1933, in the above entitled cause.

DECREE BELOW.

Such decree of the United States Circuit Court of Appeals for the Ninth Circuit affirmed the decision of the United States District Court for the Western District of Washington, Northern Division, and the verdict of the jury finding defendant guilty on four counts of the indictment.

QUESTION PRESENTED.

Whether the contents of a letter written by a husband to his wife taken down in shorthand by a stenographer in the employ of the husband are privileged.

SUMMARY OF FACTS.

This was a criminal prosecution of the defendant Conrad Wolfle for alleged violation of Section 215 P. C. forbidding the use of the mails to defraud. The indictment contains six counts. It sets forth an alleged scheme to defraud by organizing a corporation under the laws of Alaska, known as the Cantu Mining Company, and the sale of stock in said company by means of newspaper and circular advertising and correspondence, and by personal misrepresentation by said defendant and his agents, each charge being based on a specific letter sent through the mail. Count V was dismissed. The jury returned a verdict of not guilty as to Count VI.

On the trial of the cause the trial judge, over the objection of defendant's counsel, received the testimony of the witness, Grace Snyder, the appellant's private stenographer, who was permitted to prove the contents of a letter from appellant to his wife. This was a private confidential letter from appellant in Seattle to his wife at Spokane, dictated to his stenographer, who read this undated letter into evidence from her stenographic notebook which she surreptitiously abstracted from her employer's office during appellant's absence.

In this letter after telling his wife the earnest satisfaction he obtained from the report that his little daughter, Virginia, was on a school program in Spokane, and that he was proud of her, and further speaking of the result of his examination by a doctor and the fact that the doctor told him that he should leave his business for awhile and take a long rest, he stated, "I talked to a banker the other day, he said 'You have done as much as most people do in two years. Its hard to break in;' but I am going to break in, and whenever I do, I am going to rob every last one of them blind. You bet your last bottom dollar, as ever,"

RULINGS OF THE LOWER COURT.

Upon the trial of this action before a jury, the prosecution sought to introduce in evidence a con-

fidential letter written by the defendant, Conrad Wolfle, to his wife, above quoted.

This testimony offered by the witness Grace Snyder, stenographer and secretary for Mr. Wolfle, was seasonably objected to, but the trial judge overruled the defendant's objection and allowed the testimony pertaining to the letter and the reading of it from the stenographic notes to be placed before the jury.

Over the objection of the defense the jury was allowed to hear evidence damaging to the defendant which they had not by law a right to consider.

RULING OF THE CIRCUIT COURT OF APPEALS.

The Circuit Court of Appeals affirmed the decision of the lower court, overruling defendant's objection to the evidence offered by the plaintiff holding that the contents of a confidential communication between husband and wife could be testified to by a third person coming into possession of the same.

The Circuit Court of Appeals in its decision assumes that the testimony concerned an oral communication for the reason that the husband dictated the letter to the stenographer who then testified

concerning the same on the stand. However, the fact is that the stenographer did not testify from memory but read her stenographic notes which she surreptitiously took from the possession of the defendant.

REASONS FOR GRANTING WRIT.

1. The decision of the Circuit Court of Appeals for the Ninth Circuit is in conflict with the decisions of the State of Washington, the jurisdiction in which this case was tried. In reference to the privilege concerning confidential communication between husband and wife, the decision of the Circuit Court of Appeals tends to confuse the law on this subject by rendering almost a nullity the established rules of evidence concerning private relations between husband and wife.

2. The decision rendered in the District Court and the Circuit Court are in conflict with other decisions on the same subject in different Circuits, rendering federal law on this subject, confused and in non-accord.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the court below, commanding that court to certify and to send to this court for its review and deter-

mination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 7007, CONRAD WOLFLE, Appellant vs. UNITED STATES OF AMERICA, Appellee, and that the said decree (or judgment) of the Circuit Court of Appeals may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

S. J. WETTRICK,

Attorney for Petitioner.

UNITED STATES OF AMERICA,
STATE OF WASHINGTON,
COUNTY OF KING. } ss.

S. J. WETTRICK, being first duly sworn, on oath deposes and says:

That he is an attorney at law, admitted to practice before the Supreme Court of the United States; that he is one of the attorneys for the Petitioner in the above entitled cause; that the foregoing petition was prepared in good faith and not for delay; that this Petition in his opinion is meritorious and well founded in law; that he has read said Petition, knows the contents thereof, and believes the same to be true.

S. J. WETTRICK,

SUBSCRIBED and SWORN to before me this 4th day of August, 1933.

F. J. WETTRICK,
Notary Public in and for the State of of Washington, residing at Seattle.

WETTRICK, WETTRICK & FLOOD,
H. SYLVESTER GARVIN,
Of Counsel,
Attorneys for Petitioner.
Arctic Building
Seattle, Washington.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933.

No.....

CONRAD WOLFLE, Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent.

BRIEF SUPPORTING PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

The decision of the District Court overruling the petitioner's objection allowed the respondent to introduce evidence by a third party concerning a confidential communication between husband and wife. This testimony was so damaging that it had a great and controlling influence upon the verdict of the jury in this action. The jury found the petitioner guilty under the mail fraud statute on four counts; Count V was dismissed, and the jury found petitioner not guilty on Count VI.

The opinion of the Circuit Court of Appeals, San Francisco, Judges Wilbur, Sawtelle and Mack, was written by Judge Wilbur, filed April 8, 1933, R. 139), not yet reported.

Petition for rehearing was denied on June 19, 1933. The primary question considered in the decision of the Circuit Court of Appeals was whether or not a third person could testify concerning a confidential communication between husband and wife. This decision, however, was based upon the assumption of the court that the communication was oral and not written.

Jurisdiction of this court is invoked under Judicial Code, section 240(a) as amended by the Act of February 13, 1925, Ch. 229 (43 Stat. 938; 28 U. S. C. A., section 347).

The decree of the Circuit Court of Appeals to be reviewed was entered April 8, 1933 (R. 139).

Petition for rehearing was denied June 19, 1933.

Facts.

The facts are sufficiently reviewed in the petition. The question involved herein is a matter of law, and the decision of the Circuit Court of Appeals leaves but one question to be determined by this court.

Question Presented.

Whether statements in a letter written by a husband to his wife, taken down in shorthand by a

stenographer in the employ of the husband, are privileged. Or put in another form, does either spouse lose the right to claim the privilege attaching to a communication between husband and wife, where the communication is dictated to a stenographer and reduced to writing by her?

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH DECISIONS OF OTHER CIRCUTS.

Courts of other circuits have sustained the contention of petitioner by holding that the privilege pertaining to communications between husband and wife extends to evidence in the possession of third persons.

In *New York Life Insurance Co. vs. Ross*, 30 Fed. (2d) 80 (C. C. A. 6th, 1928) certiorari denied—49 S. Ct. 348, a recent case, it was held that a letter addressed by a husband to his wife and found with his will could not be introduced in evidence by the defendant in an action on behalf of the wife on a policy of life insurance.

This is also the effect of *Bowman vs. Patrick*, 32 Fed. 368 (Cir. Ct. E. D. Missouri E. D., 1887), where the administrator of the estate of the wife found letters from the husband in the papers of the deceased and in a spirit of hostility turned them over to an adverse party in a lawsuit against the husband, the court held such letters inadmissible.

Privilege Recognized in Case of Attorney and Client.

Our contention is also sustained in *Liggett vs. Glenn*, 51 Fed. 381 (C. C. A. 8th, 1892); a case involving a communication between client and attorney; at pages 396-397, Judge Shiras declared:

> "The admissibility of the communication, in our judgment, is not dependent upon the manner in which control thereof is obtained from the counsel, but upon the inherent character of the communication itself. If the admission or statement sought to be put in evidence was made by reason of the confidential relationship existing between client and counsel, it becomes a privileged communication, and as such it is not competent evidence against the party. Its competency is not dependent upon the mere manner in which knowledge thereof may be obtained from counsel. The principle forbidding its use is not adopted as a mere rule of professional conduct on the part of the attorney. It confers a right upon the client for his protection and advantage, and which he alone is authorized to waive. It will not do to hold that the communication loses its confidential and privileged character if knowledge thereof can be obtained by means which do not involve the counsel in a breach of professional duty. For illustration, a letter is written by a client to his attorney containing statements of a privileged nature. His counsel, having this letter on his person, meets with an accident, causing his death. Third parties in this way become possessed of the letter and from them it passes to the possession of the adverse party. Has this letter lost its privileged character and become competent evidence against the writer simply because it passed

from the possession of his counsel, to whom it was written, without fault on the part of the attorney? Suppose that, upon the trial of a cause, an attorney is sworn as witness and he is asked to produce a letter written him by his client. He refuses on the ground that it is confidential communication. The trial court overrules the objection and compels the production of the letter, which is filed as part of the evidence in the cause. Appellate court reverses the ruling of the trial court on this question, holding that the letter was privileged and sends the case back for a new trial. On the second hearing the attorney is not called as a witness but the clerk, in whose custody the letter was placed on the first trial, was summoned by a subpoena *duces tecum*, and required to produce the letter in order that the same may be read in evidence. It is possible that this letter, being a confidential communication between client and counsel, can be rightfully put in evidence upon the theory that the possession thereof was obtained without fault on the part of the attorney. The argument, founded upon the assumption that the admissibility of confidential communications between client and counsel is dependent solely upon considerations of the duty of counsel not to make known that which was communicated to him professionally, is, in our judgment, faulty, in that it ignores the main purpose of the rule, which is that the client shall be at liberty to freely communicate to his attorney knowledge of all matters connected with the business in hand upon the assurance that confidential communications thus made are privileged and cannot be used in evidence against him unless he deprives them of their privileged character."

Also:

Insurance Co. vs. Schaffer, 1876, 94 U. S. 457.

Similarly a husband should be able to communicate with his wife, secure in the principle that the communication is inviolate.

COMMUNICATION OF PATIENT TO PHYSICIAN PRIVILEGED.

Likewise, the law, solicitous of the welfare of the patient, grants the physician the right to avail himself of all the modern developments and improvements in the field of surgery and medicine, without relaxing the privilege. The physician may employ a trained nurse as his assistant, a bacteriologist, a technician, or a hospital recorder for the purpose of keeping records, and yet in doing so the law would not tolerate the suggestion that the physician thereby destroys the privilege thrown around communications between patient and physician.

In *Toole vs. Franklin Investment Co.* (Wash. 1930), 291 Pac. 1101, the state court permitted hospital records to be introduced in evidence against the defendant. This was, however, pronounced error by the Supreme Court, on the ground that it contravened the policy of the privilege.

See also *Culver vs. U. P. Ry.* (Nebr. 1924), 199 N. W. 794.

The privilege here in question is equally as important as privilege between attorney and client and physician and patient. Undoubtedly the policy be-

kind it is much more important and sacred than either of the other two. The communication would have been clearly privileged in either of the other two cases, regardless of dictation to a stenographer. To dissolve the privilege here would be to stultify the reasoning and purpose of the law and to confess that the law and the courts are inadequate to adapt themselves to public policy in the face of changing conditions and modern developments, and no infidelity of a stenographer should serve to make this letter an instrument of evidence.

Circuit Court's Decision Misapplies the Law of Local Forum.

The cases cited in the Circuit Court's opinion do not, it is respectfully submitted, sanction the abrogation of the privilege where the husband communicates with his wife through the medium of a stenographer.

The leading case cited in support of its decision is that of *Sate vs. Nelson*, 39 Wash. 221. The opinion in that case was written by the late Justice Rudkin, then a member of the Supreme Court of Washington. The facts of the case at bar are entirely foreign to those in the *Nelson* case, and no analogy is to be found in the two cases. The letter in question in the case at bar, was one by the defendant Wolfle to his wife, the contents of which were proven by the

shorthand notes of his stenographer. The letter in the *Nelson* case was not one written by Nelson to his wife, but on the contrary, was one written by a certain Paulina Smith, witness who had testified for the defendant Nelson. The letter was apparently released to the State by the husband of the witness, who was estranged from his wife at the time of the trial and when the letter was written. Hence the letter was clearly and properly available for impeaching purposes, and it is important that it was offered only for that purpose. Of course, the claim of privilege here would fail. Privilege no longer applies when estrangement has taken place. Moreover, the husband himself had dissolved the privilege. No such facts exist in the case at bar.

Nor does *State vs. Falsetta*, 43 Wash. 159, support the conclusion of the Circuit Court. It was not a communication of husband to wife, but was a statement made in open court by the defendant to his attorney in the presence and hearing of an officer of the law. Certainly there is no question of privilege here and the case has no relation whatever to the facts of the *Wolfle* case.

Nor does *State vs. Rasmussen*, 125 Wash. 176, lend support to the principle that dictation to a stenographer dissolves a privilege otherwise attaching. It cites the *Nelson* case, *supra*, as its authority. The *Nelson* case involves a wholly different state of

facts than the *Wolfle* case, and can be no authority for the decision of the Circuit Court.

Nor are the cases cited in the opinion from other states in harmony with the rule that the privilege is lost, by reason of dictation to a stenographer. The case of *Oregon vs. Wilkins*, 72 Ore. 77, so much relied on, involved a letter written by the defendant to his *aunt!* This would give rise to no claim of privilege. There was also a communication from the wife to the husband, which was received in evidence: but the husband and wife were then estranged, and her letter was a self-serving attempt to exculpate herself from suspicion of misconduct. Again there is absent any similarity or identity of facts, to apply that case to the situation in the *Wolfle* case.

The California cases cited, when analyzed, are equally as remote, in their facts and governing principles, as the Washington-Oregon cases heretofore discussed.

The Circuit Court in its opinion omitted mention of such excellently reasoned cases as *Ward vs. State* (Ark.), 66 S. W. 926; *Gross vs. State* (Tex.), 135 S. W. 373; *Regina vs. Lehman*, 11 Cox C. C., 152; *Regina vs. Parmenter*, 12 Cox C. C. 177. These cases apply the correct principle, for the purpose of enforcing the policy of protecting the sanctity of family life.

DICTATION TO STENOGRAPHER NOT "PUBLICATION."

The law of defamation furnishes an excellent illustration of the tendency of the law to adjust itself to the progress of the business and commercial world. Under the earlier cases a generation or two ago, when stenographers and typists first came to the attention of the law, the tendency was to adopt the view that dictation to a clerk, stenographer or typist was a "publication" such as would render the communication libelous.

Lord Esher, in *Pullman vs. Hill*, 1 Q. B. 524.

But the widespread and universal adoption of the practice of dictation to stenographers and clerks rather than communicating by the ancient manual method of using quill and pen, lead the courts to harmonize their decisions with modern commercial necessity. In the later cases therefore we find that communications dictated to a stenographer in the ordinary course of business duty are privileged.

Baxius vs. Goblet Freres, 1894 1 Q. B. 842, 2 Reports 224, 7 L. T. N. S. 638.

Edmonson vs. Birch, 1 K. B. 371; 1 B. R. C. 444.

Morgan vs. Moss, 33 L. T. R. 495 (1917).

Cartwright vs. Fishel (1917) Miss., 74 So. 278.

Owens vs. Ogilvie, 53 N. Y. S. 1033.

Central vs. Jones, Ga., 89 S. E. 429.

Glove vs. Wright, 265 Fed. 873 (Sup. Ct. D. C.).

DECISION OF CIRCUIT COURT NOT IN HARMONY.

The trend of the law is—and should be—forward looking. Wheels of progress can not be turned backward. Manual methods of conducting correspondence are gone forever. The law is not helpless to adjust itself to mechanical and commercial advancements. This court has always shown itself vigilant in conserving social and political gains which have marked the course of progress throughout the last generation. Principles of establishing maximum and minimum wage standards have been harmonized with the legalistic concept of the liberty of contract. Similarly as to zoning ordinances, workmen's compensation acts, and many other such modern innovations.

The protection of family life is equally as important today as it was hundreds of years ago when the privilege was first accorded to marital confidences and communications. It is a worthy objective to protect this privilege under modern commercial practices, and to encourage and preserve inviolate the intimate and free exchange of confidences between husband and wife. Healthy family life depends upon it. Sound public welfare in turn depends upon wholesome marital felicity. No artifice or innovation such as dictation to a stenographer should be permitted to undermine the structure of the law. Nor should any temporary expediency in

the course of a departmental prosecution for mail fraud, tempt our courts to destroy or abrogate a principle vital to public welfare.

Upon these considerations, the matter is submitted with the prayer that the decisions of the district and circuit courts be reversed.

Respectfully submitted,

S. J. WETTRICK,

WETTRICK, WETTRICK & FLOOD,

H. SYLVESTER GARVIN,

Attorneys for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1933

No. 338

CONRAD WOLFFLE,

Appellant,

vs.

UNITED STATE OF AMERICA,

Appellee.

BRIEF OF THE APPELLANT.

S. J. WETTRICK,
WETTRICK, WETTRICK & FLOOD,
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Supreme Court of the United States

OCTOBER TERM, 1933

No. 338

CONRAD WOLFLE,

Appellant,

vs.

UNITED STATE OF AMERICA,

Appellee.

BRIEF OF THE APPELLANT.

Upon the petition of the appellant, the Supreme Court of the United States on October 16, 1933, granted a writ of certiorari to the United States Circuit Court of Appeals for the 9th Circuit, "limited to the question as to what law is applicable to the determination of the question of privilege which was raised at the trial."

SUMMARY OF FACTS.

This was a criminal prosecution of the defendant Conrad Wolfle for alleged violation of Section 215 P. C. forbidding the use of the mails to defraud. The indictment contains six counts. It sets forth an alleged scheme to defraud by organizing a corporation under the laws of Alaska, known as the Cantu Mining Company, and the sale of stock in said company by means of newspaper and circular advertising and correspondence, and by personal misrepresentation by said defendant and his agents, each charge being based on a specific letter sent through the mail. Count V was dismissed. The jury returned a verdict of not guilty as to Count VI.

On the trial of the cause the trial judge, over the objection of defendant's counsel, received the testimony of the witness, Grace Snyder, the appellant's secretary and private stenographer, who was permitted to prove the contents of a letter from appellant to his wife. This was a private, confidential letter from appellant in Seattle to his wife at Spokane, dictated to his stenographer, who read this undated letter into evidence from her stenographic notebook which she surreptitiously abstracted from her employer's office during appellant's absence,

In this letter, after telling his wife the earnest satisfaction he obtained from the report that his little daughter, Virginia, was on a school program in Spokane, and that he was proud of her, and further speaking of the result of his examination by a doctor and the fact that the doctor told him that he should leave his business for awhile and take a long rest, he stated, "I talked to a banker the other day, he said 'You have done as much as most people do in two years. It's hard to break in;' but I am going to break in, and whenever I do, I am going to rob every last one of them blind. You bet your last bottom dollar, as ever," etc. (Letter found in Statement of Facts, pp. 95 and 96.)

The prejudice which resulted from the reading of such a letter to the jury is immeasurable and may easily have been the deciding point in the minds of the jurors resulting in his conviction, and yet the language may have been entirely figurative and not at all intended to convey the meaning which the words might imply, if taken literally. In the language of the hardy miner, he may have intended to pit his energy and ingenuity, if not his ability, against that of the wily banker. To a stranger, the juror, it may have contained, and was no doubt construed by him to contain a threat and determination to commit a crime. Although the intimacy of

the letter when referring to his family affairs and his personal health does not impel the discerning mind to attach a malevolent meaning to the concluding phrases of the letter, nor even invite one to translate them literally, yet to a juror hearing it read to him under the formal and solemn circumstances of courtroom atmosphere, it could not escape having a most damaging effect entirely unwarranted by its meaning.

It is earnestly contended that the admission of this letter into evidence before the jury by the court below constituted prejudicial error and that the said letter was inadmissible under the law applicable to privileged communications, as well as the secondary nature of the evidence.

HISTORY OF THE RULE.

The principle of privileged communications is one of long standing. It had its origin—or at least it occupied an important part—in the Roman law. Under that system of jurisprudence the privilege was much more extensive than under our common law. No member of a family could testify against another. The privilege of *testimonium domesticus* rendered inadmissible the testimony, not alone of the husband and wife, but that of the parents, the

sons and daughters, and all those within the family circle.

The public policy which gave rise to this comprehensive privilege was the basic Roman regard for the sanctity of family life. It was conceived as a safeguard against the corruption of domestic relations. Family life in the Roman state was recognized as a relationship requiring the fullest domestic confidence—*uberrima fides*, the preservation of which was deemed superior to the settlement of particular controversies, or even to the punishment of particular offenders.

Digest Pandects, XXII, Title V, Secs. 4, 5, 6, 9, and 24.

There was another and a closely kindred privilege in the Roman law which conferred immunity on the part of the master against testimony by his servant. It is therefore to be observed that Roman law went much farther than our own in recognizing the sanctity of a confidence, whether that confidence be one expressed by a husband to his wife, by a business man to his associate, or by a client to his attorney. Many distinguished jurists of our time, including Taylor in his famous treatise on the "Law of Evidence," regret that the privilege is not extended to all communications which were made for

the purpose of being kept confidential regardless of whether it be to a friend, a business associate, or to whomsoever. (See Taylor on "Evidence," Sec. 916, p. 622.)

Whatever may be said of the barbarity of the Turks and Saracens, their law and the law of Moslem nations conferred complete immunity on all the testimony as to communications between relatives of first and second degree, husband and wife, and master and slave. *The Hedaya*, Vol. II, Art. XXI., Sec. 2.

Under our law this privilege has much the same function as under the Roman code. It depends upon the same policy of the preservation of the home and of the marital relationship. Our Anglo-Saxon jurisprudence entertains just as solicitous a regard for the mutual fidelity of married life as did that of the Romans. While it is true that the privilege defined by our common law does not go to the extent of Roman jurisprudence, an ever-increasing number of our judges express reluctance in many cases at the compulsory disclosure of secrets learned under circumstances of the strictest confidence. Evidence of this character has been compared to, and ranked with, confessions wrung by means of the "third degree," and

has been said to be productive of greater evils than the failure to punish the particular offense involved.

A study of Roman history compels the observation that the strength and energy, and the amazing duration of Roman world-wide empire, were founded primarily upon the emphasis upon wholesome family life and the virility of Roman family units. The decline of that Empire, in no little part at least, may be and generally is traced to the dissolution of the bonds of family discipline and affection and to the disintegration of family life under Roman civilization.

THE QUESTION AT ISSUE.

The question at issue is whether in courts of the United States it is proper and competent, over the objection of the defendant, to compel the disclosure by the defendant's secretary and stenographer of the contents of a letter dictated by him in Seattle to his wife in Spokane. Do the contents of such a letter come within the privilege conferred upon the defendant by the law of the land, or is that privilege forever lost to him by reason of his having employed a stenographer for the purpose of mechanically reducing it to writing?

At the trial the defendant, through his counsel, objected to the proof of the contents of this letter on the ground that it was an invasion of the privilege conferred upon him by law, that it was a violation of the statutes of the State of Washington, and that in any event, the original not having been produced or accounted for, the stenographer's notes were not the best evidence.

Appellant has insistently urged throughout these proceedings that the letter in question and its contents were privileged as being a communication from himself to his wife; that his wife under the law was not a compellable witness and could not have been required to produce the communication; that the stenographer in the mechanical processes of transcribing her notes and reducing them to writing was nothing more than the *alter ego* of the defendant; that she acted for him and as his agent, employee and representative; that she was nothing more than a mechanical hand—in the language of the cases "an organ," "a medium," "an instrumentality" for the transmission of the communication.

The Privilege at Common Law—Its Scope and Purpose.

It has always been a settled principle of the common law from its very inception that neither the husband nor wife would be permitted, either in a civil or a criminal case, to testify one against the other. This privilege is one of several such privileges embodied as one of the fundamental principles of the common law. Other privileged communications within the same category are those of attorney and client, in modern times physician and patient, and communications of state officials. All of these particular privileges are founded upon considerations of public policy. They were not, as some courts have erroneously supposed, exceptions to the broad requirements that every witness in a court of law was compelled to disclose every fact within his testimonial knowledge. On the contrary, they were fundamental in the law. This privilege is as basic in the common law as for example the requirement of adequate consideration in the law of contracts.

The policy subserved by the privilege of communications between husband and wife was based upon the principle that the happiness of family life depended upon the inviolability of domestic confi-

dence and that the unhappiness occasioned to society by invading its sanctity and compelling public disclosures of confidential communications between husband and wife would be a far greater evil than the non-disclosure of the intimacies of family confidences.

Compulsory disclosure of such highly intimate and confidential family relationships was deemed to be destructive of the bond of mutual confidence and unquestioning trust essential to the peace and happiness of domestic relations. Society has a deeply rooted interest in the preservation of the peace of families and the maintenance of the sacred institution of marriage and in the preservation against violation of those hallowed confidences inherent and inseparable from the marital status.

The public policy involved was one that seeks to preserve inviolate the peace, good order and limitless confidence between the heads of the family circle so necessary to every well-ordered civilized society. (*Coke on Littleton, 6 B, 2 Kent's Commentaries*, 179 and 180.) (*Wigmore*, Sec. 2332.)

Taylor, in the 11th edition of his treatise on "Evidence," Vol. I, pp. 617-18, states the broad rule of privilege and the purpose of the particular

privilege as to communications between husband and wife as follows:

> "The law excludes or dispenses with some kinds of evidence *on the grounds of public policy*, because it is thought that great mischief would probably result from requiring or permitting their admission * * *. The matters which the law says shall not be the subject of evidence in courts of justice are: (1) Communications which have passed between husband and wife during marriage. * * * This rests upon the obvious ground that the admission of such testimony would have a powerful tendency to disturb the peace of families, to promote domestic broils, and to weaken, if not destroy, that feeling of mutual confidence which is the most endearing solace of married life. The protection is not confined to cases where the communication sought to be given in evidence is of a strictly confidential character, but the seal of the law is placed upon all communications of whatever nature which pass between husband and wife. It extends also to cases in which the interest of strangers are solely involved as well as those in which the husband or wife is a party on the record."
>
> *Reeves vs. Wood*, 34 L. J. 1864, M. C. 15.
>
> *Public vs. Blady*, 22 Cox C. C. 715.
>
> *O'Connor vs. Majorbanks*, 1842, 4 Man. & G. 435, 11 L. J. C. P. 267.

Leach vs. Director H. L., 22 Cox C. C. 721, 1912, again states the common law. The defendant was indicted for incest and the wife was called to testify against him. Her testimony was received by

the court below, but the House of Lords reversed the holding on the ground that she could not be compelled to testify against her husband, without his consent. Earl Loreburn, Lord Chancellor, said:

> "I do not pretend to conjecture whether the decision * * * is *pro bono publico* or not. Because on the one hand it is very desirable that in a certain class of cases justice should not be thwarted by the absence of the necessary evidence, but upon the other it is a fundamental and old principle to which the law has looked that you ought not to compel a wife to give evidence against her husband, especially in matters of a criminal nature * * *."

Lord Atkinson said:

> "I think that the principle that a wife is not to be compelled to give evidence against her husband is deep seated in the common law of this country."

Greenleaf summarizes the rule succinctly when he says:

> "It is essential to the happiness of social life that the confidence subsisting between husband and wife should be sacredly protected and cherished * * *, and to break down or impair the great principles which protect the sanctities of that relationship would be to destroy the best solace of human existence." (15th Ed., Sec. 334.)

It is only in modern times that the physician has come into the important function which he

now occupies by virtue of the progress of chemistry, biology and science. Physicians today exercise a commanding influence over the life of society and we find this privilege, either by common law or statutory enactment, recognized throughout the English speaking world.

The same considerations of public policy surrounded officials of the sovereign or of the state with the same cloak of privilege as to their communications.

THE EFFECT OF STATUTE.

It is unnecessary to concern ourselves over the question of whether the applicable law is that of the common law or of the law of the Territory of Washington at the date of its admission into the Union. There is no essential distinction between the common law and the law of the State of Washington, which is the same today as it was at the date of its admission into the Union. Our statute is but declaratory of the common law. The common law recognized the privilege of communications from husband to wife. Our statute preserves that privilege. The common law for various reasons —and among others for the reason that parties to an action were always incompetent—prohibited

the wife from testifying in her husband's favor and upon his request. This incompetency has universally been removed; so that today by statutes the wife is a competent but not a compellable witness, that is to say, she may never, without her husband's consent, testify against him as to any communication made to her, but she may at his request testify in his favor. Thus the common law privilege by statute is preserved and there is added to it the right to have the benefit of the testimony of one spouse upon the consent of the other.

Were there a question as to the applicability of state statute instead of the common law, it is settled that in courts of the United States the common law governs.

Ins. Co. vs. Shaeffer, 94 U. S. 457.
Diggot vs. Glen, 51 Fed. 381.
Rosen vs. U. S., 245 U. S. 467.

There is, however, no conflict between state statute and the common law.

Decisions Recognizing and Applying the Privilege.

The privilege as to communications between husband and wife is so closely related to the privilege as to attorney and client and physicians and

patient that we find all three treated alike in the cases. There is a conflict in the decisions as to the admissibility of such communications where testimony thereof is procured from witnesses other than the husband or the wife, or the attorney and the client, or the physician and the patient. As the cases are analyzed, it will be observed that this conflict turns upon whether the particular court adopts one or the other of two tests: *First,* that if the communication originates in confidence and under circumstances intended to be privileged, and if the privilege is not consciously surrendered, the privilege will be enforced and the communication excluded; or, *second,* regardless of the privileged origin or the confidential nature thereof, admissibility is purely a matter of custody of the communication. If it has been filched, purloined, or abstracted from the husband or the wife by any means, surreptitious or otherwise, even though in violation of the confidence inherent in the nature thereof, the communication will be admitted. The first line of cases enforcing the privilege seek to consult the nature and the purpose of the communication and to carry out the policy of the principle of law. The second line of cases in conflict therewith disregard the purpose and the policy and erroneously suppose it to have been in derogation of the com-

mon law. In those decisions any circumstance, however slight, is seized upon in order to defeat the purpose which developed the privilege as one of the constituent elements of the common law.

The principle of privilege in question was illustrated and applied in the leading case of *Gross vs. State* (Cr. Ap., Tex. 1911), 135 S. W. 373. The defendant there had written a letter to his wife which contained the expression, "For God's sake, get Emory and Maude out of the way, for they could put me to death." The lower court permitted the mother-in-law to testify that she had surreptitiously found and read the letter, and she saw her daughter burn it. This testimony was admitted over the objection of the defendant that it was a privileged communication and that its admissibility would be to compel the wife to testify against her husband. The trial court admitted it, however, upon the oft-repeated dictum that evidence, even though illegally or improperly obtained, is nevertheless admissible, and that the court will not inquire with too much nicety as to how it was procured, and also that the mother-in-law could testify just the same as if she had overheard a confidential conversation between the husband and wife.

The higher court, however, reversing the case, held that the admission in evidence of the contents of this letter was reversible error. The court in its opinion examined practically all of the cases on this subject, including privileged communications between attorney and client, as well as those between husband and wife. The court recognized the conflict among the decisions, but it repudiated the doctrine that such a privileged communication was subject to a dissolution of the privilege the moment it fell into the custody of strangers to the confidence. Space will not permit an extensive quotation from the case. It is sufficient to point out that the court adopted the principle enunciated by Justice Shiras in the distinguished case of *Liggett vs. Glenn*, 51 Fed. 381, in which the criterion invoking the question of privilege was expressed as follows:

> "The admissibility of the communication in our judgment is not dependent upon the manner in which control thereof is obtained * * *, but upon the inherent character of the communication itself. If the * * * statement sought to be put in evidence was made by reason of the confidential communication, it becomes a privileged communication and as such it is not competent evidence * * *."

Applying that principle to the case at bar, the Texas court declared:

"If this is true as to the relation of attorney and client, how much stronger the reasoning when privileged communications arise between husband and wife. Not minimizing the relations between client and attorney, but we do say that the communication between husband and wife is far more sacred and to be the more strongly guarded than that of the relation between attorney and client. * * *. It makes no difference in this case that Mrs. Maude Colman obtained possession of the letter in the manner that she did; that possession and her knowledge of the contents of the letter did not rob it of its confidential privilege and character. * * * To hold (otherwise) would be in effect to abrogate the statute and break down the purpose of the law, which was to shield and protect privileged matters occurring between husband and wife."

Cases enumerated in the decision as supporting the principle adopted were:

Cole vs. State, Tex., 88 S. W. 341;

Burke vs. State, 77 S. W. 451, Tex.;

Gant vs. State, 116 S. W. 801;

Mitchell vs. Mitchell, Tex., 15 S. W. 705;

Mercer vs. State, Fla., 24 So. 154;

Connell vs. Hudson, 53 Mo. App. 418;

Commonwealth vs. Sapp, Ky., 14 S. W. 834;

Stein vs. Bowman, 13 Pet. 209, 10 L. Ed. 129;

Sanders vs. Hendrix, 5 Ala. 224;

1 Greenleaf on Evidence, Sec. 254, Sec. 337 and 338;

Cook vs. Grange, 18 Oh. St. 526 to 531;

Brown vs. Wood, 121 Mass. 137;

Maynard vs. Vinton, 59 Mich. 139, 26 N. W. 406;

Jacobs vs. Hessler, 113 Mass. 157;

Hitchcock vs. Moore, Mich., 37 N. W. 914;

Smith vs. Potter, 27 Vt. 304, 65 A. D. 198;

Brock vs. Brock, 116 Pa. 109, 9 Atl. 486.

A case cited in the opinion, that of *Mercer vs. State*, 40 Fla. 716, 24 So. 154, contains a well-reasoned analysis of the principles to be applied in construing the question of privilege as to a communication between husband and wife. The Florida court also recognizes that some courts admit or reject proof of the communication, depending upon whether the communication is in the original custody of the husband or wife, or has escaped therefrom. The court rejects that test, but applies the more enlightened rule:

> "* * * the policy of the law that forms the foundation of the general rule, is far more strongly upheld and observed by those authorities that recognize and declare certain classes of communication to be privileged from the inherent character of the communication itself, and that in such cases the privilege attaches to the communication itself and protects it from exposure in evidence wheresoever or in whosesoever hands it may be."

A Kentucky case, that of *Scott vs. Commonwealth*, 23 S. W. 219, in a prosecution for manslaughter, held:

> "The evidence in this case shows the letter in question was secured from appellant's wife by a brother of the deceased and then came into possession of the Commonwealth attorney. But it seems to us, whether given up by her voluntarily, or obtained against her will, it was a disclosure of what had been written by her husband in the privacy and confidence of the marital relation * * *."

The same principle is illustrated in the case of *Henderson vs. Chaires*, 25 Fla. 26, 6 So. 164.

In *Selden vs. State*, (Wis.), 42 N. W. 218, the court refused even to allow secondary proof of the existence of a communication by reason of the absolute privilege attaching to the relationship of husband and wife.

In *Wilkeson vs. State*, (Ga.), 1893, 17 S. E. 990, the court held that a letter received by the wife from her husband could not be delivered by her to another person and by him put in evidence.

One of the most instructive cases in a state court on this subject is the recent case of *State vs. McKie*, (Ga.), 1927, 140 S. E. 625. The case contains a summary and analysis of the decisions on both sides of this question throughout the United

States, and after weighing the conflict in authorities adheres to the principle of giving effect to the object and purpose of the privilege.

> "Our statute makes such evidence incompetent and inadmissible. It does not simply proscribe the channel through which the evidence reaches the jury, but it makes the evidence itself inadmissible * * *. This ruling does not conflict with the decisions of this court, which hold that a party who hears a communication between husband and wife can testify touching such communication."

This court clearly seized an important distinction which has escaped many of the courts which adopt the custody rule. The prohibition of the statute is against proof of the communication. The statute is not merely directed against the competency or incompetency of certain witnesses, but over and above the question of competency are the provisions of the statute (merely declaratory of the common law) which bar proof of communications from husband to wife. As the court again declared:

> "So the introduction of the letters from the wife to her husband and from her to her attorney was not admissible upon the ground that our law makes such confidence incompetent as well as it makes the wife or husband incompetent to testify against the other."

Same Rule and Principle in Case of Attorney and Client.

We have already adverted to the principle identical in its purpose and origin with that of husband and wife, that no attorney may, during or after his employment, reveal any communication, oral or documentary, made to him on behalf of his client. This privilege is likewise founded in public policy. It is deemed in the interest of justice that laymen unskilled in learning may be able to communicate freely with those learned therein. The privilege extends not only to the attorney, but to the attorney's secretary, stenographers or clerks.

Taylor, in his work on "Evidence," Sec. 920, p. 626, states the rule thus:

> "This protection, though confined to communications between client and adviser, extends to all necessary organs in which such communications are effected, and therefore an interpreter or an intermediate agent."

The extension of this protection to the clerks and secretaries of the attorney was a modern development of the common law.

> "Formerly it was thought that a barrister's or solicitor's clerk was not within the reason and exigency of the rule; but as the principles are unable to transact all their busi-

> ness in person they are under the necessary of employing clerks, and it has since been held that such clerks cannot be permitted to disclose the facts coming to their knowledge in the course of their employment unless the barrister or solicitor might have been interrogated respecting them." Citing *Walker vs. Wildman*, 1821, 6 Madd. 47, 22 R. R. 234, 56 E. R. 1007.

In calling attention to this extension of the privilege to include clerks and agents, Taylor, in Sec. 946, says:

> "On a like principle of public policy no witness whether a peer, a member of the House of Commons, an officer of either House or a shorthand reporter can report without the permission of the House having been first obtained to disclose in the court of justice what took place within the walls of Parliament."
>
> *Plunkett vs. Cobbett*, 1804, 29 How. St. Tr. 71;
>
> *Solomons vs. Chubb*, 1852, 3 Carr & K., 75;
>
> *Forbes vs. Samuel*, 1913, 3 K. B. 719, 82 L. K. J. B. 1135.

In *Taylor vs. Foster*, 1825, 2 C. & P. 195, 172 E. R. 89, Best, C. J., granted a non-suit, because the only evidence in support of the plaintiff's action depended upon the testimony of the opposing attorney's clerk. He held that upon the ground that attorney's must employ clerks and that they cannot transact all of their business in person, the

principle of privileged communications extended to the clerk as well as to the attorney.

In *DuBarre vs. Livette*, Peake N. P. C. 78, an interpreter was excluded from testifying to a communication between the attorney and client.

In *Parkins vs. Hawkshaw*, 2 Stark. 239, 171 E. R. 633, an agent or employee of the attorney was likewise for the same reason excluded.

The clerk of an attorney was rejected as a witness in *King vs. Upper Bodington*, 1826, 5 L. J. M. C. 10 (1827).

The cases with reference to the privileged communications between attorney and client disclose a very board and comprehensive application of the principle. Law clerks and law students are exempted from testimony and come within the rule of privilege where they are engaged in assisting the attorney who is supervising them. *Wartelle vs. Novogard*, R. I. (1927), 137 Atl. 776. So also *Hunt vs. Taylor*, 1850, 22 Vt. 556; *Sibley vs. Wife*, 1867, N. Y. 180; *In re Arnott*, 1888, 60 L. T. N. S. 109. And a case in point where the stenographer of an attorney was held to come within the privilege is *State vs. Brown*, 1896, 2 Marv. (Del.) 380, 36 Atl. 458. Where the court held that the attorney could not be required to disclose the facts coming to his

knowledge for the use of the State in its prosecution of the accused, nor can his private amanuensis or clerk. To do so would be prejudicial to the public interest and would in many cases defeat the ends of justice.

Privileged Communications Between Physician and Patient.

Just as the law recognizes the privilege of communications between husband and wife and attorney and client, it establishes a similar cloak of privilege between communications of a patient to his physician. This privilege is of statutory creation and is not embedded in the common law, as are the other privileges referred to. Nevertheless, the courts do not take the position which is frequently asserted with reference to statutes in derogation of the common law, that since the tendency is to prevent a full disclosure of the truth, such a statute must be strictly construed. On the contrary, anxious to preserve the principle involved in the rule, courts very uniformly include within the privilege not only the patient and the physician, but communications made to the physician's nurse, technician or X-ray specialist, or a communication made by the patient to the physician in the presence of any of the physician's necessary assistants. If this

is true with respect to a statutory privilege, how much greater is the reason for applying the same liberal and enlightened policy with regard to the privilege of husband and wife which has grown up as a very part of the common law itself. How false, therefore, are the reason and the premises in the decisions of those cases which follow the rule of *Hammons vs. State*, (Ark.), 84 S. W. 748, 68 L. R. A. 234 the line of cases relied upon by the Government and the Circuit Court of Appeals as the basis of its decision.

A case which illustrates the application of this rule to the relation of physician and patient is that of *Culver vs. Union Pacific*, (Neb. 1924), 199 N. W. 794. The defendants there sought to introduce the testimony of the nurse of the plaintiff's doctor as to records of a Wasserman test received from a laboratory. This offer of proof was rejected by the trial court and the case was affirmed upon appeal to the Supreme Court of Nebraska. The Court said:

> "A nurse is often necessarily present at conversations between the patient and the doctor with respect to the ailment or condition of a patient and little good would be subserved if the lips of the doctor's might be sealed by the statutes as to such conversations but the nurse or attendant might freely testify to all

> that was said and everything that was done. The purpose of the law is to protect the right of privacy, and while its scope should not be unduly extended, its very intention might be completely thwarted by the admission of testimony from this class of witnesses."

The Supreme Court of Mississippi in 1932, in *Power & Light vs. Jordan*, 152 So. 483, likewise expressed a similar rule. The partner of a physician there was forbidden to testify to anything that he learned from his partner who treated the plaintiff. With regard to the nurse in the office, the Court declared:

> "Where a nurse gains information by being present and assisting a physician and overhears conversations between the patient and the physician, her testimony is incompetent. A physician must have the assistance of a nurse * * *, and to permit her to testify would be to annul the statute."

The Court then calls attention to the rule expressed in Sec. 2381, *Wigmore*, 2nd Ed., in which Wigmore points out an important exception to the rule that a third person who overhears a confidential conversation (or obtains it) can testify concerning it, thus: "Except so far as the third person is the agent." A nurse or assistant is, of course, an agent of the physician but Wigmore is speaking not alone of the privilege obtaining between the

physician and the patient but of the other privileges as well.

It is apparent that the defendant's stenographer was not a third person or a stranger in the category of those cases which permit an eavesdropper to put into testimony communications surreptitiously overheard. She was an agent, a servant, and a representative of the defendant, and she comes plainly within the spirit of the exception referred to by Wigmore.

This same principle has been recently enforced by the Supreme Court of this state (State of Washington) in the case of *Toole vs. Franklin Investment Co.*, 158 Wash. 696, 291 Pac. 1101. There also it sought to introduce certain hospital records in evidence against the plaintiff. The lower court granted this permission, but the Supreme Court declared this was error, holding:

> "These records were objected to upon the two-fold ground that they were hearsay and privileged. The rule seems to be well established that such records are hearsay testimony, and also that so far as they tend to disclose what the physician thus learned, they are protected by the rule of privileged communications, as much so as if the physicians were being examined as witnesses in person."
>
> "A nurse is often necessarily present at conversations between the patient and the doc-

tor with respect to the ailment or condition of the patient, and little good would be subserved if the lips of the doctors might be sealed by the statute as to such conversations, but the nurse or attendant might freely testify to all that was said and everything that was done. The purpose of the law is to protect the right of privacy, and, while its scope should not be unduly extended, its very intention might be thwarted by the admission of testimony from this class of witnesses." *Hommyach vs. Prudential Ins. Co.*, 1909), 194 N. Y. 456, 87 N. E. 76.

Chic., Lake Shore Ry. vs. Walas, Ind. 1922, 135 N. E. 150;

Colorado Fuel & Iron vs. Cummings, 1919, 46 Pac. 875;

Owens vs. Kansas City, 1920, Mo., 225 S. W. 234;

Sparer vs. Travelers, 1919, 173 N. Y. S. 673;

Price vs. Standard Life, Minn., 95 N. W. 1118.

FEDERAL CASES SUPPORTING THE RULE THAT A PRIVILEDGED COMMUNICATION REMAINS PRIVILEDGED, IRRESPECTIVE OF CUSTODY.

Justice Samuel F. Miller, then sitting as Circuit Judge in the District Court in Missouri in 1887, later a member of this Court, in the now famous case of *Bowman vs. Patrick*, 32 Fed. 368, decisively rejected the third party custody rule. The case was one where an administrator for the estate of the deceased, who procured some letters favorable to

the interest of adversaries of the deceased, furnished them to the other side in litigation then pending. Justice Miller was shocked and surprised to note that there were authorities holding that "where this evidence can be got at either by obtaining possession of the letter, or some method of overhearing the communication by some third party between the husband and the wife, that this evidence can be used." He held:

> "I am quite clear that the wife has no right to publish these communications; that she would not be permitted to produce the letter if she were a witness on the stand; that she could be enjoined from producing the letter if she were supposed to be hostile to her husband; and that the executor, in a voluntary and hostile spirit to the husband, who has letters, has no more right to produce them and deliver them over to the husband's prejudice than the wife has."

We might amply paraphrase this language and apply it to the facts of our case. It would read thus:

> "It is quite clear that Mrs. Wolfle has no right to publish this communication (letter); that she would not be permitted to produce the letter if she were a witness on the stand; that she could be enjoined from producing the letter if she were supposed to be hostile to her husband; and that the stenographer, in a voluntary and hostile spirit to the husband, who has the letters, has no more right to produce the letters and deliver them over, to the husband's prejudice than the wife has."

This question received a great deal of consideration from the late Justice Shiras in the case of *Liggett vs. Glenn*, 1892, 51 Fed. 381. The privilege at issue there was as to a communication between attorney and client, but the case has been recognized as an authority wherever the question of privileged communications has been raised. The defendant there in a communication had signed a written contract with an attorney, agreeing to pay him certain fees in defending suits pending against him for recovery of assessments on the stock of a a corporation. Subsequently the attorney filed the communication in probate as a voucher for a claim for fees. From this probate record another attorney obtained it and used it in a suit against a co-signer as evidence of the latter's liability on his stock. The district (then circuit) court below admitted proof of this communication in evidence, but the Circuit Court of Appeals, through Justice Shiras, reversed this ruling. The Circuit Court held that the admissibility of such a communication did not in any wise depend upon the manner in which possession thereof was acquired from the attorney, but that it was predicated upon the inherent character of the communication itself. Once privileged, it remained privileged in the absence of some unequivocal act on the part of the client waiving the privilege. Judge Shiras declares:

"In order that there may be perfect confidence established between client and counsel, and upon considerations of enlightened public policy, the rule has been established that the client may freely communicate to his counsel all facts connected with the subject out of which grows the relation in question, and that the communication, thus confidentially made, cannot be used in evidence against him unless he himself, by some unequivocal action on his part, deprives the communication of its privileged character, and thereby renders it competent evidence against himself. To fairly carry out the real purpose of the rule, it must be held that privileged communications are in and of themselves incompetent, regardless of the mere manner in which it is sought to put them in evidence * * *."

"The admissibility of the communication, in our judgment, is not dependent upon the manner in which control thereof is obtained from the counsel, but upon the inherent character of the communication itself. If the admission or statement sought to be put in evidence was made by reason of the confidential relationshp existing between client and counsel it becomes a privileged communication and as such it is not competent evidence against the party. Its competency is not dependent upon the mere manner in which knowledge thereof may be obtained from counsel. The principle forbidding its use is not adopted as a mere rule of professional conduct on the part of the attorney. It confers a right upon the client for his protection and advantage, and which he alone is authorized to waive. It will not do to hold that the communication loses its confidential and privileged character if knowledge thereof can be obtained by means which

do not involve the counsel in a breach of professional duty. For illustration, a letter is written by a client to his attorney containing statements of a privileged nature. His counsel, having this letter on his person, meets with an accident, causing his death. *Third parties in this way become possessed of the letter and from them it passes to the possession of the adversary party. Has this letter lost its privileged character and become competent evidence against the writer simply because it passed from the possession of his counsel, to whom it was written, without fault on the part of the attorney? Suppose that, upon the trial of a cause, an attorney is sworn as witness and he is asked to produce a letter written him by his client. He refuses on the ground that it is a confidential communication. The trial court overrules the objection and compels the production of the letter which is filed as part of the evidence in the cause. An appellant court reverses the ruling of the trial court on this question, holding that the letter was privileged and sends the case back for a new trial. On the second hearing, the attorney is not called as a witness but the clerk, in whose custody the letter was placed on the first trial, was summoned by a subpoena duces tecum, and required to produce the letter in order that the same may be read in evidence.* Is it possible that this letter, being a confidential communication between client ad counsel, can be rightfully put in evidence upon the theory that the possession thereof was obtained without fault on the part of the attorney. The argument, founded upon the assumption that the admissibility of confidential communications between client and counsel is dependent solely upon considerations of the duty of counsel not to make known that which was communicated to him professionally, is, in

> our judgment, faulty, in that it ignores the main purpose of the rule, which is that the client shall be at liberty to freely communicate to his attorney knowledge of all matters connected with the business in hand upon the assurance that confidential communications thus made are privileged and cannot be used in evidence against him, unless he deprives them of their privileged character."

It will be noted that in this decision the court called attention to the state statute, analyzed it, and held pursuant to the case of *Ins. Co. vs. Schaefer*, 94 U. S. 457, that state statutes did not control the competency of this sort of testimony, but that in any event the question was unimportant because the state statute was merely declaratory of the common law.

A similar case involving privilege between a physician and patient was decided in 1895 in the case of *Drier vs. Continental Life*, 24 Fed. 670. There the plaintiff's husband, in an application for insurance, had made certain statements to his physician, which the physician in turn submitted to the insurance company. Upon the death of the plaintiff's husband and upon an action on the policy, the insurance company sought to put in proof of the statements. This proof, however, was excluded on the ground that the communication was one be-

tween patient and physician and was therefore privileged.

This Court, in *Connecticut Mutual vs. Schaefer,* 94 U. S. 457, has indicated the extent to which recognition will be accorded a confidential communication between the attorney and client, even if necessary to forbid an attorney to testify to the contents of a petition for divorce in a collateral proceeding.

The most recent expression of the courts of the United States upon the subject of privileged communication is that of *New York Life vs. Ross,* C. C. Apps. (6th Circ.), 1928, 30 Fed. (2) 80. There, in an action on a policy for accidental death, the insurance company sought to make use of a letter found by the executor in his possession, which letter was written by the deceased to his wife, which apparently tended to prove the defense of suicidal death. The court held that notwithstanding that the letter was found after his death with his will by his executor, that it was a privileged communication and that it was founded upon or made in consequence of the marital relation:

> "The incompetency thus arising continues after the marital relation has been terminated by death or otherwise and a document addressed by a husband to his wife and which has no rela-

> tion whatever to the issues in the suit but is written in recognition of the uncertainty of life and to be delivered after death, would seem to fall both within the spirit and the letter of the statute."

STENOGRAPHER IS AN AGENT AND REPRESENTATIVE AND NOT A STRANGER OR THIRD PERSON.

Wigmore, Sec. 2339, 2nd Ed., declares that "A third person overhearing a confidential communication may testify to it for the same reason recognized in the privilege for a client's communications with his attorney." Under that latter subject, Sec. 2336, he says:

> "One who overhears a communication (between attorney and client), whether with or without the client's knowledge, is not within the protection of the privilege."

The examples cited are such cases as that of *Cotton vs. State*, Ala., 6 So. 396, where a jailer overheard a conversation between the accused and his attorney and was permitted to testify thereto. We have already demonstrated that on the other hand the law protects a communication between the client and the attorney's secretary, clerk, assistant, or stenographer. It is thus plain, as we have heretofore pointed out, that Wigmore did not have in mind laying down the rule that a stenographer, a clerk, or an assistant to an attorney was or could

be within the category of a third person. A third person contemplated by the rule is plainly a stranger. A jailer is a third person but not a clerk, secretary, or an assistant of either the attorney or his client. If the cases cited in the opinion of the Circuit Court of Appeals, or in the Solicitor General's reply brief, be examined, it will be found that they turn altogether upon the assumption that the stenographer in this case is identically in the same category as a third person or a stranger in any one of the many cases cited either in the opinion or in the brief.

For example, in *People vs. Dunnigan,* 1910, (Mich.), 128 N. W. 180, a case frequently cited in support of the "custody" rule, i. e., the rule that it is not the privileged nature of the communication that governs but rather the person who has acquired custody of the communication, the court itself pointedly called attention to the exception we have mentioned. There, while the defendant was in jail awaiting trial on a minor offense, the sheriff ingeniously suspecting him guilty of a murder, prevailed upon a friend to visit him in jail and obtain from him a communication from the defendant to his wife. The defendant furnished his friend with a letter to his wife, which letter constituted practically the sole evidence upon the trial in which

he was convicted of murder. In sustaining the admissibility of this letter upon the custody theory, the Supreme Court especially exempted from the custody theory those communications which remained in the custody and control of agents or representatives of the parties to the privilege. The friend in that case who had acquired custody of the letter was therefore, in the judgment of the Michigan court, not in the same category as an agent or a representative. He was purely a third party. The decision in that case has been criticized by many courts, including the court of Georgia in the *McKie* case, *supra*. But whatever may be said of it, at its worst it constitutes no authority under the facts of our case. A reading of that case and of all of the cases which are cited adversely to our position will establish an absence of a representative capacity or a relationship of agency. None of the third persons who were conceived in the line of opposing cases to have been competent witnesses were in the category of agent, representative or employee. Here the witness, Grace Snyder, was the employee and agent of the defendant Wolfle. It was her specific duty to receive dictation in shorthand notes and transcribe them upon the typewriter. Her acts within the scope of her employment were the acts of her principal. Here custody of the letter and

of the notes thereof were in the contemplation of law the custody of defendant Wolfle. The defendant Wolfle had never parted with them. In the language of Taylor on "*Evidence*," heretofore referred to, and in the laguage of the cases cited therein, she was but the organ, the medium, or the instrumentality for the transmission of the communication. She was employed to do mechanically what the defendant Wolfle would otherwise have had to do manually by use of pen and ink.

Cases Cited in Opinion of Circuit Court and by Solicitor General Have No Application to Facts of This Case.

The cases bear upon the question of privilege between communications of husband and wife cited in the Solicitor's brief and in the opinion of the Circuit Court have adopted the test hereinbefore referred to: That the all-important consideration is the question of the custody in which they are fund. If they have escaped from the possession of the parties to the privilege, they are admissible. This test of admissibility we have heretofore explained is erroneous. It is predicated upon the assumption that the law of privilege should be narrowly construed in that it has a tendency to prevent the full disclosure of the facts and in deroga-

tion of the general law. This assumption is contrary to the truth. The privilege is a fundamental part of the common law. It exists for the purpose of preserving one of the most important institutions of society. In order to effect its benevolent purpose the privilege must be as broad as the subject matter with which it is concerned. It is true that in some cases it tends to prevent a full disclosure of some of the facts, but where this happens it is in response to a superior command of public policy. The language of Vice-Chancellor Bruce Knight in *Pearce vs. Pearce*, 1847, 16 L. J. Ch. 153, at p. 159, is here very appropriate.

> "The discovery, vindication and establishment of truth are the main purposes of the existence of courts of justice. Still for the obtaining of these objects, which however valuable and important cannot be as fully pursued without moderation, cannot be creditably pursued unfairly, or gained by unfair means, *not every channel is or ought to be open.* Truth, like all other good things, may be loved unwisely, may be pursued too keenly, may cost too much; and surely the meanness and the mischief of prying into a man's confidential consultations with his legal adviser, the general evil of infusing reserve and dissimulation, uneasiness and suspicion and fear into those communications which must take place, and which, unless in a condition of perfect security, must take place uselessly, or worse, are too great a price to pay for truth itself."

State vs. Wilkins, 72 Ore. 77, cited in the opinion as the leading authority for the rule adopted by the Circuit Court below, has neither on its facts nor upon any of the principles announced therein, any application or similarity to the case at bar. There the defendant was charged with murder, having suspected the deceased with having harbored his (the defendant's) wife in his own home. The court found that there was complete estrangement between the wife and the defendant.

> "The letters taken from him and to which he objected on the ground that they were from his wife, were written by her, it would seem, after she and the defendant had become estranged from each other and were separated." (p. 82.)

That finding alone distinguishes that case from the case at bar. The law is universal that the privilege no longer survives for those communications between husband and wife after estrangement, separation, or divorce. Furthermore, the Supreme Court of Oregon distinguished the case from one invoking the rule of privilege upon the ground that the letter was from the estranged wife to her husband and that the privilege, if any, was the privilege of the wife and one that could not be claimed by the husband as the recipient of the communication. It is unnecessary to discuss the correctness of

this view, for it has some support from Wigmore, who speaks on the privilege as one belonging to the communicant. Many cases hold that the privilege is one which belongs to the marital entity, but in any event it is a sufficient answer to that case when cited by the Solicitor to point out that in the *Wolfle* case the communication in question was one written by the defendant Wolfle in Seattle to his wife in Spokane, hence the right of claiming the privilege was distinctly his.

Nor can the Solicitor derive any comfort from the case of *State vs. Nelson*, 39 Wash. 221, relied upon in the opinion of the Circuit Court. That case has not even the remotest bearing upon the case at bar in any of its facts. There was no communication there between the defendant and his wife. The defendant there in fact was not married. Paulina Smith had been separated and estranged from her husband in Alaska, and she took the stand to testify for the defendant, denying that the defendant lived in adultery with her. In order to impeach and discredit her, the State offered a communication which apparently had come into the hands of the prosecution from the estranged husband of the *witness*. This communication was not offered as substantive evidence against the defendant; its purpose was limited only to impeaching

the credibility of the witness on the stand. It was received for that purpose. It is plain that the defendant Nelson had no prerogative whatsoever to claim privilege in such a communication.

State vs. Falsetta, 43 Wash. 159, cited in the opinion, is a case of attorney and client where the latter openly in the courtroom and in the presence of peace officers, communicated with his attorney. The admissibility of such testimony is not questioned, but the cases have uniformly recognized that a communication from the client to his attorney, or to any of the attorney's clerks or assistants, is absolutely privileged. The Circuit Court in the case at bar recognized that the privilege of husband and wife is identical in its consequences with that of attorney and client. It failed, however, to perceive that a stenographer, clerk, or employee, is in a different category than a stranger or a law enforcement officer. The latter is a third party, a stenographer is not; and for this reason all of the cases unanimously hold that a communication between attorney and client is privileged, regardless of the presence of a stenographer, clerk, or employee. We need say nothing more about the *Rasmussen case* cited in the opinion than to point to the fact that its sole authority is the case of *State vs. Nelson*, just cited. That case is so completely distinguished

from ours that the *Rasmussen case*, relying upon it, can be no authority here. The California cases are equally wide of the mark. They are cases involving no debate over the principle that third parties or strangers can testify to communications voluntarily placed in their hands. The *Sneath case* is typical. There the defendant handed an open, unsealed letter to a sheriff, told the sheriff to show it to his wife and to resume possession of it. The sheriff carried out his instructions literally, and after having obtained the return of the letter from the wife, put it in evidence. No one would claim privilege where the defendant himself had failed to ask for it. In the *DeLeon case*, also cited, the defendant gave a letter to a deputy sheriff, being advised that it would be read by the sheriff and subject to the scrutiny of others than his wife. Under those circumstances he could not claim privilege. This is true also of the case of *Perry vs. State*, a case not of husband and wife, but of attorney and client. There the defendant, charged with robbery and murder, employed an attorney, who went out some miles from the county seat and dug diligently into the earth to uncover defendant's loot, and while possessing himself of the gold that he had found, the sheriff surprised him in the act. The attorney at once sought to

claim privilege, on the ground that the money belonged to his client, but the court naturally attached very little importance to the claim.

Commonwealth vs. Everson, 123 Ky. 330, is an eavesdropper case. It is a far cry from an eavesdropper case to the case of a husband's communication with his wife through the medium of his private secretary. The same thing is to be said of the case of *Commonwealth vs. Wakelin*.

We are not here concerned with a conversation in the wife's presence as in the *Fay vs. Guynon case*; nor a communication in the presence of the daughter, as in the *Lyon vs. Prouty case*; nor with the presence of a third party such as a real estate agent as in the *Long vs. Martin case*.

We need to devote but little attention to the Solicitor's citation of *State vs. Young*, 97 N. J. L. 501, 117 Atl. 713. The case was one where the defendant—after having robbed the deceased, stolen his automobile, and murdered him—upon his arrest, commissioned a third party to carry a message to his wife. The third party wrote down the message at the defendant's dictation. It was not signed by the defendant, nor was it his communication. In effect it was nothing more than if the defendant had said to the third party, "Go and tell my wife

so and so." Of course, under those circumstances the messenger would be a competent witness. There was no confidential communication involved. Here, however, the defendant Wolfle actually wrote a letter to his wife, a communication from husband to wife, which brings it within the rule of privilege. The only part played by the witness, Grace Snyder, was in reducing the defendant Wolfle's letter to writing. Wolfle, instead of writing the letter by hand, wrote it by means of his secretary and stenographer. To us there seems to be no analogy. There is nothing to suggest the relationship of agency or representative capacity on the part of Randall, the witness in the *Young case*. Had there been, we are satisfied that most courts and probably the New Jersey court, would have preserved the confidential privilege involved.

We have already pointed out the fallacy of the decision in *Hammons vs. State,* 73 Ark. 495, cited in the Solicitor's brief. There the husband, in jail, accused of a grave crime, wrote an incriminating letter to his wife and gave it to a negro visitor. The negro in turn gave it to the wife's father, who instead of giving it to the wife, gave it to the witness who proved its contents at the time of trial. That case adopted the "custody test" in total disregard of the purpose or policy of the law of privilege, or of

the confidential nature involved. It was erroneously supposed that the rule of privilege was in derogation of the common law and that it should be strictly construed. It is the leading case in support of the theory that any circumstance, however slight, should be seized upon to destroy the privilege. It is not, in our judgment, in harmony with sound reason, with enlightened public policy or accepted principles of law or weight of authority, and from the date of the decision it has been very much criticized —in fact, the case contains a vigorous dissent on the part of two of the judges of the court.

The case of *Hopkins vs. Grimshaw,* 165 U. S. 342, cited by the Solicitor, permits the testimony of a daughter to a confidential communication between a husband and wife in her presence. It has no application to the facts of our case, however. Wolfle did not speak to his wife in the presence of his daughter or any third party; he merely resorted to the mechanical process of reducing his communication to writing before it was delivered to the wife through the instrumentality of a stenographer.

Tutson vs. Holland, referred to in the Solicitor's brief, is likewise not in point. That was a case of a conversation between attorney and client in the presence of the defendant. Certainly if Wolfle

should converse with his wife in the presence of the District Attorney, we should not have the slightest right to claim privilege. Nor does *Coles vs. Harsch*, next cited by the Solicitor, aid in the solution of this problem. The case was one for alienation of affections. It was not the husband who claimed the privilege, but it was the defendant who had won the wife's affections from the husband. The court pointed out that the rule did not exist for the purpose of destroying the marital relationship, but in aid thereof.

Cases cited against the view urged herein, are founded entirely upon the premise that a stenographer taking dictation is a third party, a stranger to the parties composing the confidential relationship. We have pointed out that the principle of privilege involved is one of public policy which applies equally and uniformly to the relationship, whether it be that of physician and patient, attorney and client, or husband and wife. Whatever may have been the case generations ago, it is a step backward to refuse the husband in the law of privilige the right to avail himself of the benefit of modern time-saving methods and devices afforded by stenographic dictation and transcription. We can not close our eyes to the fact that business men frequently and repeatedly dictate and communicate to-

day whether those communications be confidential communications to attorney, doctor or wife. The marital relationship is, if anything, much more essential to the well being of society than any of the other privileged categories.

Libelous Statements Dictated to a Stenographer, Privileged.

Under the great weight of authority today, the dictation of libelous statements to a stenographer, or the delivery of a written libelous communication to a stenographer, clerk, typist, or agent do not constitute delivery or publication and are deemed privileged. This was not always the case. It is a modern growth and development in the law. Lord Escher in a case which for a time gained some support, that of *Pullman vs. Hill,* 1 Q. B. 524 (1891), held that such a communication was not privileged. There the defendant dictated a defamatory communication to his stenographer, who transcribed it on a typing machine. It was then press-copied by the office boy and mailed to the plaintiff. Lord Escher felt that the stenographer had no interest or duty in the matter. He said:

> "If a merchant wishes to write a letter containing defamatory matter and to keep a copy of the letter, he had better keep a copy of it himself. * * * He ought to write the letter

himself and keep it himself, and if he keeps it in a book, he ought to keep the book in his own custody."

This case means that in 1891 Lord Esher did not feel that the practice among business men of dictating letters to their stenographers was sufficiently general to be worthy of judicial cognizance on the part of the courts. He felt rather uncertain of his ground, however, because with a very slight variation of the facts and circumstances in the next case coming before him, that of *Boxius vs. Goblet Freres*, 1894, 1 Q. B. 842, he receded from his position and held that the dictation to the stenographer was on a privileged occasion. This latter case was only three years after the case of *Pullman vs. Hill*. It involved a communication by an attorney on behalf of his client, who communicated a libelous statement to the plaintiff. He held at that time that the dictation to a clerk in the lawyer's office and the copying of a letter into the letter-book by another clerk was privileged. Thus Lord Esher himself was conscious of the growth and development of the practice of dictation in business. *Pullman vs. Hill* was not so decisively overruled at that time that it did not obtain a certain following among a number of courts.

We find in *Puterbaugh vs. Gold Medal Furniture Co.,* (1904), 7 Ont. 582, a Canadian court reluctantly following what it conceived to be the rule of *Pullman vs. Hill.* The case was also followed in *Gambrill vs. Schooley,* 93 Md. 48, and in a number of other American jurisdictions.

The authority of that case was, however, decisively repudiated in *Lawless vs. Anglo-American Cotton Co.,* L. R. 4 Q. B. 262. In 1907 it was completely overruled in the case of *Edmondson vs. Birch,* L. R. 1 K. B. 371, 1907, where it was held that there was no actionable libel in handling a libelous letter to a telegraph operator for transmission. The privilege has been uniformly recognized from that time to this in the English cases.

Odgers in the 6th Edition on "Libel and Slander," p. 135, points out the fallacy of *Pullman vs. Hill.*

The latest case on this subject is that of *Osborn vs. Boulter* (C A. 1930), 2 K. B. p. 226. Scrutton, L. J., said:

> "The letter, however, can give rise to no cause of action, unless it was published to some third party * * *. In my view, on the question of whether privilege is lost by communicating to a staff of clerks the alleged defamatory matter, the rule we have to apply has been laid down by this court, after a consideration of

> *Pullman vs. Hill, in Edmondson vs. Birch* * * *. If the principle is as there laid down, the decision in *Pullman vs. Hill* is merely that in 1890 it was not a usual and reasonable thing for a member of a business firm to dictate a letter containing defamatory statements to, and have it copied by, a clerk * * *. That is a decision of fact * * *. If the principle laid down in those later cases is what we have to apply, how is it to be applied in the present case? * * * Is it lost because in 1930 a man writing such a letter dictates it to a typist, who reads it out of her notes * * *? That appears to me to be a reasonable way of making a communication to another party, even though the letter contains defamatory statements * * *. It seems to me: (1) That the occasion, on which the letter was written was privileged * * *; (3) That the protection of the privileged occasion was not lost by the dictation of the letter to the typist, that being a reasonable and ordinary method in commercial matters of writing letters, even though they may contain defamatory statements."

Greer, L. J., was of the same opinion and he pointed out how, in the process of development, *Pullman vs. Hill* has been discarded; he said:

> "I have come to the conclusion that no one could possibly say that at the present time, or when this letter was written, it was other than a reasonable and usual course of business, for brewers and business people generally, instead of writing business letters in their own hand, to write them through the intermediary of a typist."

These cases present an interesting study in the capacity of the common law to adapt itself to changing conditions and modernizing developments. There is something reminiscent of the days of the stage-coaches and of the quill and pen in the earlier decision of Lord Esher. *Pullman vs. Hill* was, as the courts now remark, a declaration that modern methods had not so far progressed at that time as to warrant a finding that the use of dictation and typing was usual and general throughout the business community. The later cases, however, recognizing it now to be a fact that the convenience of society is immensely served and promoted by the use of these modern methods, demonstrate that the principles of the law of privilege are sufficiently broad to apply to those facts and to preserve the purpose and the object of the law.

Many American cases have adopted the rule of *Edmondson vs. Birch,* repudiating *Pullman vs. Hill,* notably such cases as *Globe Furniture vs. Wright,* (1920), D. C. App., 265 Fed. 873; *Owen vs. Ogilvie,* 53 N. Y. S. 1033 ; *Cartwright vs. Fischel* (1917), Miss., 74 So. 278; *Flynn vs. Reinke,* 225 N. W. 744; and a case from our own jurisdiction (State of Washington), *Prince vs. Holland North America Mortgage Co.,* 107 Wash. 206, 181 Pac. 680.

These modern cases all recognize that clerks, typists, and stenographers are agents and employees, and that a communication to them as such is not a communication or publication to third persons or strangers. The knowledge of the clerks, agents and employees is the knowledge of the principal and that which the principal releases to his agent, clerk or employee, he does not release or publish to third persons or to the world.

This it is shown that the law recognizes this fiduciary relationship between the principal, his clerk, agent, or employee in the case of physician and patient, attorney and client, in the law of libel, and that it would be illogical to do otherwise in the case of husband and wife.

PRIVILEGE CANNOT BE DEFEATED BY SECONDARY PROOF.

Where the law on public policy forbids the production upon the trial of the original of a communication, it will not permit the policy to be evaded by secondary proof of its contents. This principle is self-evident. It has been applied in many instances in the law of privilege. For example, the law upon public policy protects communications made by state officials, no matter how relevant they

may be in subsequent or collateral inquiries, or for that matter even though they may be libelous. Where this is true, the law will not sanction any evasion or indirect attempt to get in proof of the contents of such communications.

Dawkins vs. Rokevy, 1873, 44 L. J. R. Q. B. 63 (Ex.); 45 L. J. R. Q. B. 8 (H. L.)—(the same case on appeal);

Atwood vs. Chapman, 1914, 3 K. B. 275;

Chatterton vs. Sec'y of State, 1895, 2 Q. B. 189, 64 L. J. Q. B. 676;

Bowman vs. Norton, 1931, 5 C. & P. 177.

In *King vs. Upper Bodington, supra*, the court refused to receive testimony by the clerk as to contents of a certain deed, on the ground that the attorney himself could not be permitted to produce the deed and the privilege could not be circumvented by calling upon the attorney's clerk to furnish secondary evidence thereof.

Taylor, in his treatise on "*Evidence*," p. 622, likewise lays down the rule that where communications are privileged, secondary evidence is not compellable. He points out how illusory it would be for the law to say that a party is privileged from producing a deed, but that secondary evidence of its contents can be compelled. The privilege and

the protection undertaken by law would, under those circumstances, he says, be illusory.

> "When the law is restrained by public policy from enforcing the production of papers, a like necessity restrains it from doing what would be the same thing in effect, namely, receiving secondary evidence of their contents." *Taylor*, Sec. 948.

Appellant has insistently maintained throughout this appeal that since the wife herself was admittedly incompetent to prove the contents of this communication, or to put the communication into evidence, a calling of the defendant's stenographer to prove the contents from her stenographic notes was nothing more than an attempt by the prosecution to do by indirection that which the law directly forbade. The calling of the stenographer to prove the communication presupposed on the face of it that the original was in existence.

Courts Will Not Sanction Evidence Violative of Public Policy or Principles of Law.

It is apparent that the calling of Grace Snyder, secretary and stenographer for the defendant Wolfle, to prove from her shorthand notes the contents of a letter which Wolfle had written to his wife, constitutes an effort to circumvent the rule that a communication from a husband to wife is privi-

leged. If is conceded, of course, that Mrs. Wolfle could not have been called and compelled to produce the letter. The principles we have heretofore mentioned would preclude such an attempt. More important in the eyes of the law than the conviction of Wolfle is the necessity of carrying out the object of the law of privilege: the preservation of the marital relationship and with it the preservation of family life. The law will not permit the prosecution to do that indirectly which it is forbidden to do directly.

Here we have a communication by the defendant Wolfle, a man over 60 years of age, father of two children and the head of a family. The letter in question touches upon some of the most intimate objects of the family relationship—the welfare of his two daughters, their progress in school; his own particular ailments, what the doctor had told him concerning them; his mode of life; his plans for the future; closing with the paragraph which the Government has considered to have been self-incriminating. Can we imagine any communication from husband to wife of a more personal, private and confidential character? This was not such a communication as he intended should have been disclosed or published to the world. He did not intend to tear aside the veil of privacy which speaks forth

from every line of this communication, or to dissolve the confidential privilege which the law has thrown around it.

If the prosecution, by such an artifice as that resorted to in this case, may so easily destroy the privileged relationship, does it not with regard to that relationship "place the liberty of every man in the hands of every petty officer," as James Otis remarked with reference to writs of assistance.

Is it not, as Lord Camden on another occasion declared: "subversive of all of the comforts of society"? Would we not invade "the sanctity of a man's home and the privacies of life"? Would we not violate "the security of private affairs and papers from the inspection and scrutiny of others"? See opinion of Justice Brandeis in *Olmstead vs. U. S.*, 277 U. S. 438, 72 L. Ed. p. 944.

There are many elements of similarity between the case at bar and the case of *Gouled vs. U. S.*, 255 U. S. 298. In the *Wolfle case*, if the normal procedure of law had been pursued and the wife had been called upon to produce the letter, and had done so, and if the communication were otherwise competent evidence, it would have been open to the objection that it would require the defendant to testify against himself. Is it possible for the pros-

ecution thus easily to trample upon fundamental constitutional rights and to compel the defendant to testify against himself by putting in secondary proof of what, in its origin would have been thoroughly objectionable? The *Gouled case* illustrates what we have in mind. There the defendant was convicted, by means in part at least, of a communication which was taken from his possession by a private in the military intelligence corps who gained access to the paper through pretending to be a friend of the defendant. The court held that the seizure by the soldier of this communication was done by stealth, through social acquaintance and under the guise of a business call, and that under such circumstances it was an unlawful seizure. The admission of such a communication in evidence, the Supreme Court held in an opinion by Justice Clarke, compelled the defendant to be a witness against himself in violation of the 5th Amendment. The court regarded it as an invasion of the security and privacy of the home, guaranteed by the 4th Amendment, and as testimony against himself guaranteed by the 5th Amendment. It rendered him the unwilling source of evidence which that amendment forbids. Here in the case at bar the defendant Wolfle found to his surprise upon the trial that, through the medium of his stenographer and private secretary and her

stenographic notes, the Government had obtained, in much the same means as in the *Gouled case*, a copy of this communication of his to his wife. He finds this communication of his being used as a part of the Government's case against himself. The trial court and the Circuit Court assumed that it was unnecessary to concern itself with the source from which this testimony came. "That courts in criminal trials will not pause to determine how the possession of evidence tendered has been obtained." It is pertinent here to quote some of the language of Justice Clarke in that decision:

> "While this is a rule of great practical importance, yet after all it is only a rule of procedure and therefore not to be applied as a hard and fast formula to every case, regardless of its special circumstances. We think rather that it is a rule to be used to secure the ends of justice under the circumstances presented by each case. * * * A rule of practice must not be allowed for any technical reason to prevail over a constitutional right."

Here, too, we must consider that the result of the procedure adopted by the prosecution was to evade a very important privilege of the defendant, that of preserving the confidence of a communication from himself to his wife and of preventing it being used as self-incriminating testimony. Under these circumstances everything should

be presumed against the theory that the stenographer and private secretary was at the time of the dictation of this letter a third person or a stranger in the same category as one who overhears a confidential conversation. On the contrary the law should exert itself under these circumstances to promote the accomplishment of the principle involved and not to defeat it.

In the *Olmstead case* above referred to, the majority opinion written by the late Chief Justice Taft, held that evidence obtained by means of tapping wires could be used in court without violating the 5th Amendment against self-incrimination. Chief Justice Taft pointed out that if the communication had been obtained in violation of the privilege of either the 4th or 5th Amendment, under the rule of the *Boyd case*, 116 U. S. 616; the *Weeks case*, 232 U. S. 383; the *Amos case*, 255 U. S. 313, and the *Silverthorne case*, 251 U. S. 385, the use of testimony predicated thereon could not be sanctioned. In other words, if the privilege of the 4th and 5th Amendments were violated and the testimony was surreptitiously or otherwise obtained, the testimony itself would be suppressed and rejected. To do otherwise, the courts of the United States have frequently pointed out, would be, to under-

mine, evade and destroy the privilege of the 4th and 5th Amendments.

Long prior to the adoption of the 4th and 5th Amendments protection was afforded by the very substance of the common law against the use of communications from husband to wife, as well as from client to attorney. The 4th and 5th Amendments did nothing more than to add to those fundamental privileges two others, namely, the privilege against wrongful search and seizure, and the privilege against self-incrimination. If the policy of the law is sound with regard to the refusal to permit an indirect evasion of the privileges created by the 4th and 5th Amendments in order to preserve the purpose contemplated thereby, it is equally true that the courts should protect the immemorial privilege of common law, no less important, against the violation of marital confidences. Justice Brandeis declared of the *Boyd case* that it would be remembered as long as civilized liberty lives in the United States. It was the forerunner of those cases which have insisted that the Government itself is bound by its own Constitution. Likewise it is bound by the substantive law of the land and by all of the recognized principles of the common law, and no stratagem or artifice should be permitted to

wipe out the benefit of the great common law principle affording an absolute privilege for communications between husband and wife.

CONCLUSION.

We have described the history of the privilege of husband and wife, and the purpose and policy which brought it into being as a substantive ingredient of the common law. The same public policy which created the privilege of husband and wife, likewise conferred a privilege upon communications between attorney and client and physician and patient, as well as communications of state officials. The statute of this and other states has in no wise derogated from or altered the common law. The decisions, which in our judgment are supported by the weight of authority and by the best reasoned analysis and which are consonant with the purpose and policy of the law, apply the rule of privilege wherever the communication arises in, or as a result of, the condential relationship. Those cases which deny the privilege under these circumstances, we have pointed out, proceed upon two false premises: First, that the court will not concern itself with the methods in which the communication has been purloined from the parties to

the privilege (the custody rule); and second, that the privilege is in derogation of the general law and is to be strictly construed. These premises are untenable. The courts will carry out the purpose of the law and will protect confidential relationship; and, moreover, courts will liberally apply the rule of privilege, which is not in derogation of the common law, but on the contrary an important substantive part of the body thereof.

Again, we have described the evolution in the law with regard to its attitude toward dictation of communications in the law of libel and defamation. The earlier disposition to deny privilege has been overruled and today courts for the most part recognize that clerks, stenographers and typists are a necessary organ, medium, or instrumentality in the mechanical processes of carrying on such communications. Stenographers and private secretaries are not third parties or strangers, as some of the cases have supposed, but constitute the *alter ego* of the communicant.

We have concluded by pointing out the strong analogy, if not a precise parallel, between the case at bar and cases involving a violation of the privilege of the 4th and 5th Amendments. Under either view such evidence should be excluded.

We respectfully submit that the decision of the Circuit Court of Appeals, if left to stand, would defeat the object, the purpose, and the policy of the law by resorting to an artifice, a stratagem, and a technicality. The wheels of progress cannot be turned backward; correspondence can no longer be carried on by obsolete manual methods. Stenography is one of the recognized agencies by which men today reduce their communications to writing. The law is not helpless to adjust itself to mechanical and commercial advancements. This has been frequently illustrated by decisions of this Court. The principles establishing maximum and minimum wage standards have been harmonized with the legalistic concept of the liberty of contract and similarly as to zoning ordinances, workmen's compensation acts, and many other such modern innovations.

There is no finer or greater object for the solicitude of this Court than the preservation of everything that will tend to encourage and promote family life. This court should, in the judgment of your petitioner, lend its aid to preserve inviolate the intimate and free exchange of confidences between husband and wife. Healthy family life depends upon it. Sound public welfare depends upon wholesome marital felicity. No artifice or innovation,

such as dictation to a stenographer, should be permitted to undermine a structure of common law or destroy a principle vital to our public well-being. Upon these considerations the matter is submitted, with the prayer that the decisions of the District and Circuit Courts be reversed.

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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 338

CONRAD WOLFLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 139) is reported in 64 F. (2d) 566.

JURISDICTION

The judgment sought to be reviewed was entered April 10, 1933. (R. 144.) Petition for rehearing was denied June 19, 1933. (R. 144.) Petition for certiorari was filed August 14, 1933. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the contents of a letter from a husband to his wife, which letter was dictated to a stenographer, may be received in evidence against him.

STATEMENT

Petitioner was convicted in the United States District Court for the Western District of Washington under an indictment charging him with using the mails to defraud in the promotion of a mining company. (R. 1, 53.) He was sentenced to serve four years on each of four counts of the indictment, the sentences to run concurrently. (R. 58.) All the evidence is not incorporated in the record. (R. 128.) On appeal, the judgment of conviction was affirmed. (R. 144.)

ARGUMENT

Petitioner's contention that his stenographer could not testify to the contents of the letter which he dictated to his wife would seem to require abrogation of the rule that one overhearing an otherwise confidential communication may testify to such communication.

The only portion of the letter which is here material reads as follows (R. 92):

> * * * I talked to a banker the other day; he said "You have done as much as most people do in two years." He says "It is a hard time to break in," but I am going to break in and whenever I do, I am going to rob every last one of them blind, you bet your last bottom dollar. * * *

The Circuit Court of Appeals appears to have gone deeply into the subject, and we, therefore, present here its conclusions (R. 139–142):

We think it clear that the statement of the husband to his stenographer is not privileged even though it was intended to be communicated to his wife. The law protecting a spouse from the testimony of the other spouse does not extend to oral communications to third persons, even if intended for transmission to the other spouse. Appellant cites no case to the contrary. The quotation in the brief from *Hammons* v. *State* (Ark.), 84 S.W. 718, seems to support appellant's contention, but an examination of the case discloses that it tends to support the ruling of the trial court in the case at bar. That court said:

"The authorities are practically agreed that when a conversation between husband and wife is overheard, it may be testified to by the third party." Citing, 1 Greenleaf on Evidence, § 254; *Comm.* v. *Griffin,* 110 Mass. 181; *Fay* v. *Guynon,* 131 Mass. 31; *Allison* v. *Barrow,* Tenn. 91 Am. Dec. 291; *State* v. *Center,* 35 Ft. 378; *Griffin* v. *Smith,* 45 Ind. 366.

It is also held that a conversation is not privileged when made in the presence of third persons, citing *Reynolds* v. *State* (Ind.), 46 N.E. 31; *Mainard* v. *Beider,* 2 Ind. App. 115; Robbs Appeal, 98 Pa. 501.

The case at bar was tried in the United States District Court for the State of Washington, and in the absence of Federal legislation upon the subject the law of the territory of Washington at the time of her admission into the Union as a state controls

in the trial of criminal cases in the Federal courts sitting therein. *Rendleman* v. *U.S.*, 18 F. (2d) 27; *Olmstead* v. *U.S.*, 277 U.S. 438, 466–7, 469; *Tinsley* v. *U.S.*, 43 F. (2d) 890, 895.

The statute of the territory of Washington on the subject of privileged communications between husband and wife was contained in §392 of the Code of 1881 and is now embodied in Hill's Statutes and Codes of Washington, §1649. It was derived from a similar code section in the State of California (Cal. Code Civ. Proc., §1881). That section of the California Code has been adopted in substantially the same form in all the states in this circuit (Oregon, §733 Ore. Laws 1920; Arizona, §4412 Struckmeyer's Rev. Code 1928; Nevada, §5424 Rev. Laws Nevada, 1912; Idaho, §7937, Idaho Comp. Stats. 1919; Montana, Rev. Code Mont. 1921, §10,536), and it has been uniformly held that the privilege does not extend to oral communications to third persons nor to written communications entrusted to or coming into the hands of third persons. With reference to these code sections thus adopted by the State of Oregon the Supreme Court of that state in *State* v. *Wilkins*, 72 Ore. 77, while recognizing that some courts have held that a written communication from the husband to the wife should be excluded as privileged "no matter into whose possession the communication, if in writing, may fall," also held that the authorities all agree that if oral communications between husband and wife were over-

heard by third parties they may be given in evidence by the third party. The court also declined to follow the decisions of other states holding that the privilege extended to a writing between them which had come into the possession of third parties and decided that the purpose of the rule was to protect the speaker or writer from the testimony of the other spouse and that the privilege does not extend to communications when disclosed to strangers. The same view was expressed by the Supreme Court of the State of Washington in an earlier case, *State* v. *Nelson,* 39 Wash. 221. In *State* v. *Falsetta,* 43 Wash. 159, it was held that the rule concerning privileged communications between husband and wife had no application to the testimony of a third person who overheard such communication. (See also *State* v. *Rasmussen,* 125 Wash. 176.) The same rule has been followed in California (*People* v. *Chadwick,* 4 Cal. App. 63, 72; *People* v. *Swaile,* 12 Cal. App. 192, 196). The same rule has also been followed in Arizona (*Chas. De Leon* v. *Territory of Arizona,* 9 Ariz. 161), and in Idaho as to communications between attorney and client (*State* v. *Perry,* 4 Idaho 224).

In speaking of privileged communications between husband and wife, Wigmore on Evidence, 2d ed., page 89, sec. 2336, says:

> The circumstances which will negative this implication of secrecy must of course vary with the particular case. Commonly, the

> *presence of a third person* within hearing will negative a marital confidence; * * *.

Idem, p. 98, sec. 2339, says:

> A *third person overhearing* a confidential communication may testify to it, for the same reason recognized in the privilege for a client's communications with his attorney (*ante*, § 2326).
>
> * * * * *

And sec. 2326, p. 77, idem, above cited, reads as follows:

> * * * Since the means of preserving secrecy of communication are entirely in the client's hands, and since the privilege is a derogation from the general testimonial duty and should be strictly construed, it would be improper to extend its prohibition to third persons who obtain knowledge of the communications. One who overhears the communication, whether with or without the client's knowledge, is not within the protection of the privilege. The same rule ought to apply to one who surreptitiously reads or obtains possession of a document in original or copy.

In support of his text, Wigmore (p. 98) cites, among other cases, *Commonwealth* v. *Everson,* 123 Ky. 330, where eavesdropper testimony was admitted; *Commonwealth* v. *Wakelin,* 230 Mass. 567, dictograph record of conversation between husband and wife; and again on pp. 90–91, *Fay* v. *Guynon,* 131 Mass. 31, 33, conversation in presence of wife's sister; *Lyon* v. *Prouty,* 154 Mass. 488, 491, commu-

nication in presence of daughter; *Long* v. *Martin*, 152 Mo. 668, communications in presence of a third person; similarly *Queener* v. *Morrow*, 1 Coldw. 123, 128.

Directly in point is *State* v. *Young*, 97 N.J.L. 501, 505, wherein the court said:

> * * * But the defendant further objects to the testimony because he claims it to be a confidential communication from husband to wife, and therefore privileged. The answer to this is that it was not communicated to the wife, but to a third person, to be by him put in writing at the request of the defendant. Our statute provides, section 5 of "An act concerning evidence" (*Comp. Stat.*, p. 2222): "Nor shall any husband or wife be compellable to disclose any confidential communication made by one to the other during marriage," and under it, to establish a privilege, based on the marital relation, the communication must be confidential and made by one to the other during marriage. To commit the communication to a third person to be transmitted to the wife, whether orally or in writing, destroys the element of confidence; nor is it a communication made by the husband to the wife. The communication to a third party under such circumstances amounts to a waiver by the husband of marital confidence such as the statute contemplates. The privilege is personal to husband and wife. "A third person who happened to overhear a personal conversation between husband and wife may be ex-

amined as to such conversation. A letter, also written confidentially by a husband to a wife, is admissible against the husband when brought into court by a third party." *Whart. Cr. Ev.*, § 398; *Commonwealth* v. *Wakelin* (*Mass.*), 120 *N.E. Rep.* 209. The instant case is much stronger, for here the husband entrusted the communication to the witness to be reduced to writing, and no such privilege as is invoked exists. 28 *R.C.L.* 527, § 116.

In *Commonwealth* v. *Everson*, 123 Ky. 330, 332–333, it was said:

> The court refused to admit the evidence of Mrs. Delara on the ground that a communication between husband and wife was confidential. While neither the husband nor wife may testify as to any communication between them, the authorities so far as we can find, are unanimous in holding that third persons may testify to communications overheard by them between husband and wife. *Bank* v. *Hutchinson*, 62 Kan. 9, 61 Pac. 443; *State* v. *Center*, 35 Vt. 379; *Allison* v. *Barrow*, 3 Cold (Tenn.) 414, 91 Am. Dec. 291; *Gannon* v. *People*, 127 Ill. 507, 21 N. E. 525, 11 Am. St. Rep. 147; *Commonwealth* v. *Griffin*, 110 Mass. 181; *Rex* v. *Simons*, 6 C. & P. 542. In the last case, Alderson, B., said: "What a person is heard saying to his wife, or even to himself, is evidence." The rules as to private communications between husband and wife is by all the authorities put on the same plane as private communications between attorney and client; and it

> has been said that if persons wish the communications they have with their attorneys to be kept secret, they should be careful not to talk in the hearing of others. 4 Wigram on Evidence, Sec. 2339; 1 Greenleaf on Evidence, Sec. 254. * * *

In *Hammons* v. *State,* 73 Ark. 495, the rule is thus stated (p. 499):

> * * * The authorities are practically agreed that when a conversation between husband and wife is overheard it may be testified to by the third party. 1 Greenleaf on Evidence, §254; *Com.* v. *Griffin,* 110 Mass. 181; *Fay* v. *Guynon,* 131 Mass. 31; *Allison* v. *Barrow (Tenn.)* 91 Am. Dec. 291; *State* v. *Center,* 35 Vt. 378; *Griffin* v. *Smith,* 45 Ind. 366.
>
> It is also held that a conversation is not privileged when made in presence of third persons. *Reynolds* v. *State,* 46 N.E. 31; *Mainard* v. *Beider,* 2 Ind. App., Sec. 183; 28 N.E. 196; Robb's Appeal, 98 Pa. 501.
>
> As the tendency of the rule is to prevent a full disclosure of the truth, it must be strictly construed. *Satterlee* v. *Bliss,* 36 Cal. 508; *Foster* v. *Hall,* 12 Pick. 98; *Gower* v. *Emery,* 18 Me. 82.

See also *Hopkins* v. *Grimshaw,* 165 U.S. 342, 351; *Tutson* v. *Holland,* 50 F. (2d) 338, 339–340; *Coles* v. *Harsch,* 129 Oreg. 11, 23; *DeLeon* v. *Territory,* 9 Ariz. 161.

There is no sound reason why petitioner should not be bound by the rule which permits third parties

to testify to communications otherwise privileged. His acquainting his stenographer with the contents of the letter necessarily negatives any intention of secrecy. Then too, the privilege rule is subject to strict construction because it prevents the discovery of evidence. Dictation to a stenographer is not the usual and ordinary way in which a husband corresponds with his wife, and the cases upon which petitioner relies holding privileged business letters so dictated are not in point, but rest upon a different principle.

CONCLUSION

Petitioner raises no question deserving of review on certiorari and, as there exists no conflict of decisions, we respectfully submit that his petition should be denied.

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SEPTEMBER 1933.

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v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals (R. 139–143) is reported in 64 F. (2d) 566.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 10, 1933. (R. 143–144.) A petition for rehearing was denied June 19, 1933. (R. 144.) The petition for writ of certiorari was filed August 14, 1933, and was granted October 16, 1933 (R. 149), limited as hereinafter set forth. The jurisdiction of this Court is invoked under Section

240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

In granting certiorari this Court limited its review "to the question as to what law is applicable to the determination of the question of privilege which was raised at the trial." (R. 149.)

The record discloses that over the objection of the petitioner, who was on trial in a Federal court in the State of Washington for using the mails in furtherance of a scheme to defraud, his stenographer was permitted to read from her stenographic notes a letter dictated by the petitioner to his wife, which contained a statement from which the jury might draw an inference of criminal intent on the part of the petitioner.

STATEMENT

Petitioner was convicted in the District Court of the United States for the Western District of Washington upon four counts of an indictment charging him with using the mails in furtherance of a scheme to defraud (R. 1–30, 53). The fraudulent scheme related to the promotion of a mining enterprise in Alaska. Petitioner was sentenced to imprisonment for four years on each of the counts upon which he was convicted, the terms of imprisonment to run concurrently, and to pay a fine of $250 on each count (R. 58). Upon an appeal to the Circuit Court of Appeals for the Ninth Circuit the judgment below was affirmed (R. 139–143).

With reference to the question presented for review in this Court, the record discloses that the Government called as a witness Mrs. Graee Snyder, petitioner's stenographer, and that she was permitted to read from her stenographic notes the contents of a letter, addressed to petitioner's wife, which petitioner had dictated to her (Mrs. Snyder) on or about June 15, 1929 (R. 93–97).[1] In this letter, which is set out in full at R. 91–92 and R. 95–96, the petitioner, after referring, among other things, to the condition of his health, made the following statement (R. 96):

> I told him [the petitioner's doctor] "All right, you leave your business and I will leave mine and we will go away together." He said he cannot do it; I says, "I cannot, either"—so, I will stay on the job, because this Cantu Mine, by God, has to be finished. It has been going very slow but we are all working and we are going to succeed. I talked to a banker the other day; he said "You have done as much as most people do in two years." He said "It is a hard time to break in" but I am going to break in and

[1] There is a statement in the petitioner's brief that the stenographic notebook which the stenographer used in taking notes of this letter was surreptitiously abstracted from her employer's office during his absence. (Br. 4.) While this, of course, would have no bearing upon the competency of the stenographer to testify as to the contents of the letter, we merely wish to say that we find no support in the record for petitioner's assertion. (See cross-examination of the stenographer, R. 97–106.)

> whenever I do, I am going to rob every last one of them blind, you bet your last bottom dollar.

Petitioner objected to the above testimony on the ground, *inter alia*, that the letter was a privileged communication between husband and wife and that its admission would be in violation of the statutes of the State of Washington, but the objection was overruled and petitioner noted an exception. (R. 94.) After the testimony was admitted petitioner moved that it be stricken and that the jury be instructed to disregard it. The court likewise denied this motion and petitioner was allowed an exception. (R. 97.) The action of the trial court in admitting this testimony was sustained by the Circuit Court of Appeals for the Ninth Circuit in a unanimous opinion. (R. 139–144.)

ARGUMENT

I

THE LAW WHICH IS APPLICABLE IN DETERMINING THE QUESTION OF PRIVILEGE RAISED AT THE TRIAL IS THE LAW OF WASHINGTON AT THE TIME WASHINGTON WAS ADMITTED INTO THE UNION AS A STATE

In *Funk* v. *United States*, No. 394 of the present term, a Federal criminal case coming from North Carolina, which was argued in this Court on November 13th and 14th of this year and is now pending for decision, review was limited by this Court in granting certiorari "to the question as to what law is applicable to the determination of the competency of the wife of the petitioner as a witness."

In considering this question the Government in its brief discussed at length the pertinent decisions of this Court and reached the conclusion that, in the absence of a Federal statute upon the subject, the applicable law in determining the competency of a witness or the admissibility of testimony in a Federal criminal case is, so far as a case originating in one of the thirteen original states is concerned, the law of that state which was in force in 1789, when the courts of the United States were established by the Judiciary Act of that year (*United States* v. *Reid*, 12 How. 361; *Jin Fuey Moy* v. *United States*, 254 U.S. 189; *Barton* v. *United States*, 25 F. (2d) 967 (C.C.A. 4th), certiorari denied, 278 U.S. 621), but that so far as a case originating in a state admitted after 1789 is concerned, the applicable law is the law of that state which was in force at the time it was admitted into the Union. (*Logan* v. *United States*, 144 U.S. 263; *Hendrix* v. *United States*, 219 U.S. 79; *Olmstead* v. *United States*, 277 U.S. 438.)

In the *Olmstead* case, which arose in the same Federal District Court as the instant case, this Court said with reference to the contention that evidence obtained through the intercepting of telephone messages by government agents was inadmissible because the mode of obtaining it was unethical and a misdemeanor under a law of the State of Washington enacted in 1909 (pp. 466–468):

> While a Territory, the English common law prevailed in Washington and thus con-

tinued after her admission in 1889. The rules of evidence in criminal cases in courts of the United States sitting there, consequently are those of the common law. *United States* v. *Reid*, 12 How. 361, 363, 366; *Logan* v. *United States*, 144 U.S. 263, 301; *Rosen* v. *United States*, 245 U.S. 467; *Withaup* v. *United States*, 127 Fed. 530, 531; *Robinson* v. *United States*, 292 Fed. 683, 685.

The common law rule is that the admissibility of evidence is not affected by the illegality of the means by which it was obtained. * * *

* * * * *

The common law rule must apply in the case at bar.[2]

* * * * *

This statute [the statute of the State of Washington] does not declare that evidence obtained by such interception shall be inadmissible, and by the common law, already referred to, it would not be. *People* v. *McDonald*, 177 App. Div. (N.Y.) 806. Whether the State of Washington may prosecute and punish federal officers violating this law and those whose messages were intercepted may sue them civilly is not before us. But clearly a statute, passed twenty years after the admission of the State into the Union cannot affect the rules of evidence applicable in

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[2] If there had been a territorial statute upon the subject involved, and if that statute had continued in force when Washington was admitted as a State, that statute would, of course, have governed. *Cf.* the *Logan* case. See also last sentence of this quotation. on this page

courts of the United States in criminal cases, Chief Justice Taney, in *United States* v. *Reid*, 12 How. 361, 363, construing the 34th section of the Judiciary Act, said:

"But it could not be supposed, without very plain words to show it, that Congress intended to give the states the power of prescribing the rules of evidence in trials for offenses against the United States. For this construction would place the criminal jurisprudence of one sovereignty under the control of another." See also *Withaup* v. *United States*, 127 Fed. 530, 534.

The only exception to the rule announced in the above cases which has been recognized by this Court is that referred to in *Rosen* v. *United States*, 245 U.S. 467. In that case, which involved the competency of a convict to testify on behalf of the Government in a federal criminal case in New York, the contention was made that the convict was incompetent because under the common law as it was administered in New York in 1789, he would not have been permitted to testify. This Court, after referring to the modern rule, as revealed in both legislation and judicial decision, under which all persons of competent understanding are permitted to testify, leaving to the jury the question of the weight and credibility of their testimony, said (p. 471–472):

Satisfied as we are that the legislation and the very great weight of judicial authority which have developed in support of this

> modern rule, especially as applied to the competency of witnesses convicted of crime, proceed upon sound principle, we conclude that the dead hand of the common-law rule of 1789 should no longer be applied to such cases as we have here, and that the ruling of the lower courts on this first claim of error should be approved.

In the *Funk* case the Government contended in its brief that the *Rosen* decision was implicitly, if not expressly, limited to the particular disqualification with which the Court was there concerned and that the later decisions of this Court in the *Jin Fuey Moy* case and the *Olmstead* case expressly confirmed the view that the *Rosen* decision should not be regarded as abrogating the rule laid down in the *Reid* and *Logan* cases except to the extent mentioned.

It should also be noted that the *Rosen* case arose in one of the thirteen original states and not in a state admitted since 1789. For this reason we do not think that it may be regarded as a criterion in ascertaining the rule which is applicable in determining the competency or admissibility of testimony in a Federal criminal case originating in one of the newer states.

We submit, therefore, that the law which is applicable to the determination of the question of privilege which was raised at the trial of this case is the law of Washington which was in force at the time of the admission of Washington into the

Union.* That this was the rule applied below is evident from the opinion of the Circuit Court of Appeals. That court said (R. 140)

> The case at bar was tried in the United States District Court for the State of Washington, and in the absence of Federal legislation upon the subject the law of the territory of Washington at the time of her admission into the Union as a state controls in the trial of criminal cases in the Federal courts sitting therein. *Rendleman* v. *U.S.*, 18 F. (2d) 27; *Olmstead* v. *U.S.*, 277 U.S. 438, 466-7, 469; *Tinsley* v. *U.S.*, 43 F. (2d) 899, 895.

II

PETITIONER'S STENOGRAPHER WAS COMPETENT TO TESTIFY AS TO THE CONTENTS OF THE LETTER IN QUESTION

While this Court has limited its review to the question as to what law is applicable to the determination of the question of privilege which was raised at the trial, it may be of assistance to the Court in the disposition of the case for the Government to discuss on its merits the question of the competency of petitioner's stenographer to testify as to the contents of the letter in question.

At the time Washington was admitted as a State there was in force the following provision of the Code of 1881:

> SEC. 392. The following persons shall not be examined as witnesses:

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* The admission of Washington as a state was proclaimed by the President on November 11, 1889 (26 Stat. 1552.)

1. A husband shall not be examined for or against his wife, without the consent of the wife, nor a wife for or against her husband without the consent of the husband; *nor can either during marriage or afterwards, be without the consent of the other, examined as to any communication made by one to the other during marriage.* But this exception shall not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other." (Italics ours.)

[1] Section 388 of the Code provided that "Every person of sound mind, suitable age and discretion, except as hereinafter provided, may be a witness in any action, or proceeding," and Section 389 of the Code provided that "Any person offered as a witness shall not be excluded from giving evidence, by reason of his interest in the event of the action, as a party thereto, or otherwise, but such interest may be shown to affect his credibility; * * *."

[2] Section 24 of the Enabling Act for Washington, North and South Dakota, and Montana, approved February 22, 1889, c. 180, 25 Stat. 676, 681, provided that:

> all laws in force made by said Territories, at the time of their admission into the Union, shall be in force in said States, except as modified or changed by this act or by the constitutions of the States, respectively.

The constitution of the State of Washington, which was ratified by the people of that State on October 1, 1889 (Hill's Annotated Statutes and Codes of Washington, Vol. 2, p. 809), provided in Article XXVII, Sec. 2, that:

> All laws now in force in the territory of Washington which are not repugnant to this constitution shall remain in force until they expire by their own limitation, or are altered or repealed by the legislature: * * *. [Hill, p. 853.]

While we have been unable to find any decisions by the Supreme Court of the Territory of Washington, prior to the admission of Washington as a state, construing that portion of the above statute which provides that neither spouse shall, during marriage or afterwards, without the consent of the other, be examined as to any communication made by one to the other during marriage, this provision has been carried without change into subsequent compilations of the laws of Washington and is still the law of that State. (Remington's Revised Statutes of Washington, Annotated, Vol. 3, Sec. 1214.) It has been the subject of construction by the highest court of the State of Washington. As the provision has of course the same meaning today as it had when originally enacted, the construction which the state's highest court has given it should, if not deemed controlling, be considered as, at least, highly persuasive.

With reference to the derivation of the statutory provision in question and the applicable decisions of the Supreme Court of the State of Washington construing the provision, as well as the decisions of the highest courts of other states in the same Federal judicial circuit concerning similar provisions in their statutes having a like origin, the court below said (R. 140–142):

> The statute of the territory of Washington on the subject of privileged communications between husband and wife was contained in § 392 of the Code of 1881 and is

now embodied in Hill's Statutes and Codes of Washington, § 1649. It was derived from a similar code section in the State of California (Cal. Code Civ. Proc., § 1881). That section of the California Code has been adopted in substantially the same form in all the states in this circuit (Oregon, § 733 Ore. Laws 1920; Arizona, § 4412 Struckmeyer's Rev. Code 1928; Nevada, § 5424 Rev. Laws Nevada, 1912; Idaho, § 7937, Idaho Comp. Stats. 1919; Montana, Rev. Code Mont. 1921, § 10, 536, and it has been uniformly held that the privilege does not extend to oral communications to third persons nor to written communications entrusted to or coming into the hands of third persons. With reference to these code sections thus adopted by the State of Oregon the Supreme Court of that state in *State* v. *Wilkins*, 72 Ore. 77, while recognizing that some courts have held that a written communication from the husband to the wife should be excluded as privileged "no matter into whose possession the communication, if in writing, may fall," also held that the authorities all agree that if oral communications between the husband and wife were overheard by third parties they may be given in evidence by the third party. The court also declined to follow the decisions of other states holding that the privilege extended to a writing between them which had come into the possession of third parties and decided that the purpose of the rule was to protect the speaker or writer from the testimony of

> the other spouse and that the privilege does not extend to communications when disclosed to strangers. The same view was expressed by the Supreme Court of the State of Washington in an earlier case, *State* v. *Nelson*, 39 Wash. 221. In *State* v. *Falsetta*, 43 Wash. 159, it was held that the rule concerning privileged communications between husband and wife had no application to the testimony of a third person who overheard such communication. See also *State* v. *Rasmussen*, 125 Wash. 176). The same rule has been followed in California (*People* v. *Chadwick* 4 Cal. App. 63, 72; *People* v. *Swaile*, 12 Cal. App. 192, 196). The same rule has also been followed in Arizona (*Chas. De Leon* v. *Territory of Arizona*, 9 Ariz. 161), and in Idaho as to communications between attorney and client (*State* v. *Perry*, 4 Idaho 224).

From the decisions of the Supreme Court of Washington referred to above, we think it is evident that the statute means precisely what it says, that neither spouse may be required to reveal testimonially any communication which is made to him or her by the other spouse during the marriage, but that the privilege does not preclude the testimony of a third person who has acquired knowledge of such a communication. Thus, in the *Nelson* case, 39 Wash. 221, the Supreme Court of Washington upheld the admission in evidence of a letter written by a wife to her husband, which had been introduced for the purpose of impeaching her testimony, because (p. 228):

> This letter was produced and offered in evidence by the officers of the state, and had therefore lost its character as a privileged communication. Underhill, Crim. Evid., p. 234; Wharton, Crim. Evid. (9th ed.), 398; *State* v. *Hoyt*, 47 Conn. 518, 36 Am. Rep. 89; *State* v. *Buffington*, 20 Kan. 599, 27 Am. Rep. 193; *People* v. *Hayes*, 140 N.Y. 484, 35 N.E. 951, 37 Am. St. 572, 23 L.R.A. 830.

This ruling was reiterated in the *Rasmussen* case, 125 Wash. 176, 180, which involved the production by a witness, who was neither the defendant nor his wife, of a letter written by the defendant to his wife, and in the *Falsetta* case, 43 Wash. 159,* the

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*While the court below in its opinion (quoted above on p. 13) stated erroneously that this case involved a privileged communication between husband and wife instead of between attorney and client, there can be no question that the court's ruling applies alike to both privileges. Both are provided for in the same section of the Washington Code (Code of 1891, sec. 392; Hill's Annotated Statutes and Codes of Washington, vol. 2, sec. 1649; Remington's Revised Statutes of Washington, vol. 3, sec. 1211), and the language employed with reference to privileged communications between attorney and client differs in no material respect from that used in connection with privileged communications between husband and wife. The paragraph of the code section dealing with the former privilege immediately follows that referring to privileged communications between husband and wife and reads as follows:

> 2. An attorney or counselor shall not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment.

court said with reference to the testimony of a witness who had overheard a conversation between an attorney and his client (p. 162):

> On cross-examination the state asked him if he did not state to his counsel in the court room in the presence of an officer of the court that he possessed a revolver at that time. On his denying the fact, the state put the officer on the stand and, over the objection of the appellant, he was permitted to testify that he had heard the appellant make such a statement. It is objected that this statement was a privileged communication between the defendant and his attorney, and that it was error to permit the officer for that reason to testify to it. But such is not the rule. Doubtless the attorney could not have been compelled to testify to the fact over the objection of the appellant, but the rule that precludes the attorney from testifying has no application to a third person who by accident or design overhears the communication. 23 Am. & Eng. Ency. Law (2d ed.), p. 72.

The Washington decisions are clearly in accord with the great weight of authority, whether the privilege be urged under the common-law rule or under modern statutes. See Wigmore on Evidence, 2d Ed., Vol. 5, Sec. 2336, pp. 89–90; Sec. 2339, p. 98; Sec. 2336, p. 77; Chamberlayne on Evidence, Vol. 5, pp. 5294–5296; Roscoe on Criminal Evidence, 13th Ed., p. 104; Jones on Evidence, 2d Ed., p. 920; Greenleaf on Evidence, 16th Ed., p. 392;

Phillips on Evidence, 5 Amer. Ed., p. 64, note (4); pp. 65–66; *Annotation to Nash* v. *Fidelity-Phenix Fire Insurance Co.* (106 W.Va. 672) appearing in 63 A.L.R., pp. 101, 108 *et seq.*, notes II and III; 28 Ruling Case Law, p. 528, par. 117; 40 Cyc. pp. 2358, 2359. See also *Dickerson* v. *United States*, 65 F. (2d) 824, 827 (App.D.C.), certiorari denied October 16, 1933 (No. 374); *United States* v. *Guiteau*, 1 Mackey (D.C.Rep.) 498, 548.

The basis of the Washington and other like decisions was well stated in *State* v. *Wilkins*, 72 Ore. 77, where the Supreme Court of Oregon said with reference to a provision in the Oregon statutes which is identical with that involved herein (pp. 80–82):

> It will be observed that the statutes are directed against the examination of either spouse as a witness, and not against communications between them, the knowledge of which is derived from independent sources. The authorities all agree that, if oral communications between husband and wife are overheard by third parties, they may be given in evidence from the mouth of the witness to whom they were thus imparted. It is not perceived that any difference in principle can exist because the communication is in writing and has fallen into the possession of strangers by whom it is disclosed. It must be admitted that the decisions are not uniform on this subject. Many precedents like *Gross* v. *State* (Tex. Cr. App.), 135

S.W. 373 (33 L.R.A. (N.S.) 477), maintain the rule that, if the statement is one about which the spouse cannot be examined as a witness, the shield of privilege is never laid aside, no matter into whose possession the communication, if in writing, may fall. Other cases, like *State* v. *Wallace*, 162 N.C. 622 (78 S.E. 1); *Connella* v. *Territory*, 16 Okl. 365 (86 Pac. 72); *People* v. *Swalle*, 12 Cal. App. 192 (107 Pac. 134); *People* v. *Dunnigan*, 163 Mich. 349 (128 N.W. 180, 31 L.R.A. (N.S.) 940); *O'Toole* v. *Ohio German Fire Ins. Co.*, 159 Mich. 187 (123 N.W. 795, 24 L.R.A. (N.S.) 802), forming in our judgment the weight of authority, establish the rule that if the communications in question, although in writing, are produced by third parties, even if secured surreptitiously, [they] are admissible in evidence, and the court will not concern itself about how possession of them was acquired. The reason of the rule is that it is necessary to preserve the trust that should ever exist between husband and wife, so that, if one spouse should make to the other a communication, the confidence thus reposed would remain as inviolable as though "in the deep bosom of the ocean buried," with the result that either may fearlessly make to the other a statement most vitally affecting the interests of the speaker or writer with the assurance of the law that the other will not be called upon to disclose the same. The essence of the rule seems to be the protection of the speaker or writer from the testimony

> of the other spouse. The shield is of no avail against such communications when disclosed by strangers. If either of the marital parties would enjoy the privilege, that one must take care that the secret does not become public.

See also *People* v. *Hayes*, 140 N.Y. 484, 495–496.

As the tendency of the privilege is to prevent the full disclosure of the truth, it should be strictly construed. *Lloyd* v. *Pennie*, 50 Fed. 4, 11 (N.D. Cal.); *Tutson* v. *Holland*, 50 F. (2d) 338, 340 (App, D.C.); *O'Toole* v. *Ohio German Fire Insurance Co.*, 159 Mich. 187, 193. The compelling of petitioner's stenographer to testify in this case as to the contents of the letter to petitioner's wife did not in anywise thwart the public policy upon which the doctrine of privileged communications between husband and wife is founded. It did not disturb, to use the language of the *Hayes'* case, "that mutual confidence between husband and wife which is the strongest guaranty of a happy marriage." It did not infuse reserve and dissimulation into that relationship, and it did not permit or require the wife to violate the confidence which her husband had the right to repose in her. The communication in the instant case was not made available to a third person through the connivance of the wife, and we are therefore not concerned with the conflicting decisions which bear upon the question as to whether, under such circumstances, the third person

may testify as to the contents of the communication. Here we have a case where a husband who is asserting the privilege imparted knowledge of an intended communication to his spouse, to one other than the spouse. We see no logical reason why the fact that the third person happens in this case to be the stenographer of the spouse making the communication and asserting the privilege takes the case out of the well-settled rule, as applied to oral communications, that one who overhears a communication between husband and wife, whether with or without their knowledge, and whether surreptitiously or openly, may testify regarding what he learns, or its well-established counterpart, as applied to written communications, that one who by accident or design and without the connivance of the addressee secures a communication between husband and wife, may testify with reference thereto.

It is undoubtedly true that a business man is entitled to repose confidence in his stenographers and clerks, but recognition of such a confidence is not necessary to preserve inviolate the confidential relationship between husband and wife which is the basis of the privilege here attempted to be asserted. That privilege is preserved if the spouse to whom the communication is made is forbidden either to testify or to place someone else in a position to testify as to the contents of the communication. What the petitioner here is really asserting is not

a privilege based on a confidential relationship existing between husband and wife, but a privilege based on a confidential relationship existing between a business man and his employee, and the simple answer to his contention is, we think, that the law has not yet seen fit to extend the doctrine of privileged communications to such a relationship, nor is the recognition of such a relationship needed to give full effect to the doctrine as applied to the relationship of husband and wife.

That the third person rule applies regardless of the closeness or intimacy of the relation between the person who overhears or acquires knowledge of a communication between a husband and wife and the spouse who makes the communication, finds ample demonstration in the cases. Thus, in *Hopkins* v. *Grimshaw*, 165 U.S. 342, 351, this Court said:

> Stephney Forrest's widow was neither a party to nor interested in this suit, having conveyed all her interest in the subject thereof to the defendant Grimshaw before the suit was brought. She was therefore incompetent to testify to private conversations between her and her husband in his lifetime; and a conversation between them in their own home, in the presence of no one but their young daughter, who does not appear to have taken any part in it, must be deemed to be

> a private conversation, within the rule. *Jacobs* v. *Healer*, 113 Mass. 157.
>
> *The daughter herself may have been a competent witness to such a conversation.* * * * (Italics ours.)

See also *State Bank* v. *Hutchinson*, 62 Kan. 9, involving the testimony of a daughter. In other typical cases the third person whose testimony was considered admissible was: A clerk in the defendant's store and a boarder at his home, who overheard an incriminating conversation between the defendant and his wife while the witness was in a room about ten feet from the bedroom of the defendant and his wife (*Nash* v. *Fidelity-Phenix Fire Insurance Co.*, 106 W.Va. 672); a wife's brother, in whose presence a conversation between husband and wife took place. (*Insurance Co.* v. *Shoemaker*, 95 Tenn. 72); a boarding-house mistress, who had eavesdropped at the door of a room at the boarding house in which a husband and wife were conversing (*Commonwealth* v. *Everson*, 123 Ky. 330); members of a son's family who had overheard a conversation between the son's father and his stepmother (*Martin* v. *Martin*, 267 Mass. 157); a fellow prisoner to whom the husband entrusted a letter for transmission to his wife, who occupied another cell in the same jail (*Commonwealth* v. *Smith*, 270 Pa. 583); the attorney of a libellant for divorce, where

it appeared that the libellant addressed a letter to her attorney directing him to dismiss an earlier libel brought by her, that the letter tended to contradict her testimony at the trial, that she showed the letter to her husband, and that she and her husband went with the letter to the office of his attorney, where she handed it to his attorney, by whose typist it was copied (*Drew* v. *Drew*, 250 Mass. 41, 45), the court saying—

> It was not a privileged communication with either her attorney or her husband because, if the testimony was believed, the original and the copy were shown by her to third persons. This destroyed her privilege concerning it—

a fellow prisoner to whom a husband dictated a letter to his wife (*State* v. *Young*, 97 N.J.L. 501, 505), the court saying—

> But the defendant further objects to the testimony because he claims it to be a confidential communication from husband to wife, and therefore privileged. The answer to this [the objection that the communication was privileged] is that it was not communicated to the wife, but to a third person, to be by him put in writing at the request of the defendant. Our statute provides, section 5 of "An act concerning evidence" (*Comp. Stat., p.* 2222): "Nor shall any husband or wife be compellable to disclose any confidential communication made by one to the other during marriage," and under it, to

> establish a privilege, based on the marital relation, the communication must be confidential and made by one to the other during marriage. To commit the communication to a third person to be transmitted to the wife, whether orally or in writing, destroys the element of confidence; nor is it a communication made by the husband to the wife. The communication to a third party under such circumstances amounts to a waiver by the husband of marital confidence such as the statute contemplates. The privilege is personal to husband and wife. "A third person who happened to overhear a personal conversation between husband and wife may be examined as to such conversation. A letter, also written confidentially by a husband to a wife, is admissible against the husband when brought into court by a third party." *Wharf. Cr. Ev.*, § 398; *Commonwealth* v. *Wakelin* (*Mass.*), 120 *N. E. Rep.* 209. The instant case is much stronger, for here the husband entrusted the communication to the witness to be reduced to writing, and no such privilege as is invoked exists. 28 R. C. L. 527, § 116.

The cases cited by the petitioner which hold that the privilege between attorney and client extends to an attorney's clerks, secretaries and stenographers are obviously not apposite. As Wigmore points out (Vol. 5, Sec. 2301, p. 40):

> The assistance of these agents being indispensable to his work, and the communi-

> cations of the client being often necessarily committed them by the attorney or by the client himself, the privilege must include all the persons who act as the attorney's agents.

The same reasoning also, of course, applies to the necessary assistants of a physician, nurses, technicians, etc., but stenographers, clerks and typists are of course not necessary to the successful functioning of the marriage relation.

For the same reason, those decisions relied upon by petitioner which hold that a business man or merchant does not publish a libelous statement simply by dictating it to a stenographer are not in point. The *ratio decidendi* of these decisions was clearly explained by one of the judges in *Osborn* v. *Boulter* (C.A. 1930), 2 K.B., p. 226, 236 (cited by petitioner), when he said:

> I have come to the conclusion that no one could possibly say that at the present time or when this letter was written it was other than a reasonable and usual course of business for brewers and business people generally, instead of writing business letters in their own hand, to write them through the intermediary of a typist * * *.

It is not the usual or customary mode for the husband to utilize a stenographer in carrying on secret and private correspondence with his wife.

We think it is evident that whether the test to be applied is the law of Washington at the time Washington was admitted into the Union or the

weight of authority generally, petitioner's stenographer was competent to testify as to the contents of the letter in question.

CONCLUSION

For the reasons stated above, the judgment below should be affirmed.

Respectfully submitted.

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DECEMBER, 1933.

U. S. GOVERNMENT PRINTING OFFICE: 1933

SUPREME COURT OF THE UNITED STATES.

No. 338.—October Term, 1933.

Conrad Wolfle, Petitioner, *vs.* The United States of America.	On Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[January 8, 1934.]

Mr. Justice Stone delivered the opinion of the Court.

This case comes here on certiorari, 290 U. S. —, to review a ruling of the District Court for Western Washington in a criminal trial, admitting in evidence against the accused, the petitioner here, a statement contained in a letter written by him to his wife, but proved by the testimony of a stenographer, reading from her notes, to whom petitioner had dictated the letter and who had transcribed it. The ruling was upheld and the conviction sustained by the Court of Appeals for the Ninth Circuit, 64 F. (2d) 566, which adopted as the test of admissibility of the evidence its interpretation of the statute in force in the territory of Washington at the time of its admission to statehood. § 392, Code of Washington, 1881; see *State* v. *Nelson*, 39 Wash. 221; *State* v. *Rasmussen*, 125 Wash. 176.

During the present term this Court has resolved conflicting views expressed in its earlier opinions by holding that the rules governing the competence of witnesses in criminal trials in the federal courts are not necessarily restricted to those local rules in force at the time of the admission into the Union of the particular state where the trial takes place, but are governed by common law principles as interpreted and applied by the federal courts in the light of reason and experience. *Funk* v. *United States*, No. 394, decided December 11, 1933. If any different rule with respect to the admissibility of testimony has been thought to apply in the federal courts, Wigmore on Evidence, 2d Ed., § 6; compare *Alford* v. *United States*, 282 U. S. 687, it is clear that it should be the same

as that governing the competence of witnesses. So our decision here, in the absence of Congressional legislation on the subject, is to be controlled by common law principles, not by local statute.

The statement to which the witness was permitted to testify in the present case was a relevant admission by petitioner, probative of his guilty purpose or intent to commit the crime charged. It was therefore rightly received in evidence unless it should have been excluded because made in a communication to his wife.

The government insists that confidential communications between husband and wife are privileged only when the testimony offered is that of one of the spouses, and that the privilege does not exclude proof of communications between them, however confidential, by a witness who is neither the husband nor the wife. The question thus raised remains open in the federal courts.[1] But we find it unnecessary to answer it here, for in the view we take the challenged testimony to the communication by the husband to his wife is not within the privilege because of the voluntary disclosure by him to a third person, his stenographer.

The basis of the immunity given to communications between husband and wife is the protection of marital confidences, regarded as so essential to the preservation of the marriage relationship as to outweigh the disadvantages to the administration of justice which the privilege entails. See *Hammons* v. *State*, 73 Ark. 495,

[1] Mr. Justice Miller, sitting as Circuit Justice, excluded evidence of confidential communications in a letter written by the husband to his wife, found by the latter's administrator among her papers, although proved by a third party witness. Bowman *v.* Patrick, 32 Fed. 368; cf. Lloyd *v.* Pennie, 50 Fed. 4. A like decision was reached by the Circuit Court of Appeals for the Sixth Circuit, in New York Life Ins. Co. *v.* Ross, 30 F. (2d) 80. The Court of Appeals for the Eighth Circuit made the same ruling with respect to a communication between an attorney and client in Liggett *v.* Glenn, 51 Fed. 381, and a district court reached a similar conclusion with respect to communications between physician and patient in Dreier *v.* Continental Life Ins. Co., 24 Fed. 670. Compare a dictum in Hopkins *v.* Grimshaw, 165 U. S. 342, 351. It seems that many state courts rule that a communication between husband and wife, however confidential, may be proved by the testimony of a third person who has acquired knowledge of it, even though without the assent of the spouse making the communication, at least where the spouse to whom the communication was made is not responsible for the disclosure. Hammons *v.* State, 73 Ark. 495; Wilkerson *v.* State, 91 Ga. 729; O'Toole *v.* Ohio German Fire Ins. Co., 159 Mich. 187; State *v.* Wallace, 162 N. C. 622; cf. People *v.* Hayes, 140 N. Y. 484.

500; *Sexton* v. *Sexton*, 129 Iowa 487, 489, ff; *O'Toole* v. *Ohio German Fire Ins. Co.*, 159 Mich, 187, 192; Wigmore on Evidence, 2d ed., § 2336. Hence it is that the privilege with respect to communications extends to the testimony of husband or wife even though the different privilege, excluding the testimony of one against the other, is not involved. See *Gordon, Rankin & Co.* v. *Tweedy*, 71 Ala. 202, 210; *Wickes* v. *Walden*, 228 Ill. 56; *Southwick* v. *Southwick*, 49 N. Y. 510, 519; Wigmore on Evidence, 2d ed., §§ 2227, 2228, 2332, 2333.

Communications between the spouses, privately made, are generally assumed to have been intended to be confidential, and hence they are privileged; but wherever a communication, because of its nature or the circumstances under which it was made, was obviously not intended to be confidential it is not a privileged communication. See *Caldwell* v. *State*, 146 Ala. 141, 143; *Parkhurst* v. *Berdell*, 110 N. Y. 386, 393; *Truelsch* v. *Miller*, 186 Wis. 239, 249. And, when made in the presence of a third party, such communications are usually regarded as not privileged because not made in confidence. *Jacobs* v. *United States*, 161 Fed. 694; *Cocroft* v. *Cocroft*, 158 Ga. 714; cf. *Linnell* v. *Linnell*, 249 Mass. 51, with *Freeman* v. *Freeman*, 238 Mass. 150.

Here it is suggested that the voluntary disclosure to the stenographer negatives the confidential character of the communication. Cf. *State* v. *Young*, 97 N. J. L. 501. But we do not think the question which we have to determine is one of fact whether the petitioner's letter to his wife was intended to be confidential. We may take it that communications between husband and wife may sometimes be made in confidence even though in the presence of a third person, see *Robin* v. *King*, 2 Leigh. (Va.) 140, 144; and that would seem especially to be the case where the communication is made in the presence of or through the aid of a private secretary or stenographer whose duties, in common experience, are confidential. Cf. *Edmonson* v. *Birch & Co.*, [1907] 1 K. B. 371, 382. Accordingly the question with which we are now concerned is the extent to which the privilege which the law concedes to communications made confidentially between the husband and wife embraces the transmission of them, likewise in confidence, through a third party intermediary, communications with whom are not themselves protected by any privilege. Cf. *Drew* v. *Drew*, 250 Mass. 41.

Petitioner invokes the authority of those cases where the privilege granted to communications between attorney and client has been held to exclude proof of the communication by the testimony of a clerk present when it was made, see *Sibley* v. *Waffle,* 16 N. Y. 180, 183; *Wartell* v. *Novograd,* 48 R. I. 296, 301; *Taylor* v. *Forster,* 2 C. & P. 195; cf. *State* v. *Brown,* 2 Marv. (Del.) 380, 397, and of those where the statutory privilege extended to the information gained by a physician from consultation with his patient has been deemed to exclude, by implication, proof of the condition of the patient by testimony of a nurse who attended the consultation. See *Culver* v. *Union Pacific R. Co.,* 112 Neb. 441, 450; cf. *Mutual Life Ins. Co.* v. *Owen,* 111 Ark. 554. It is said that the stenographer here similarly stood in a confidential relationship to the petitioner and that the communication to her of the contents of petitioner's letter to his wife should, on grounds both of reason and convenience, be protected by the privilege which the law extends to confidential communications privately made between husband and wife.

We may assume for present purposes that where it is the policy of the law to throw its protection around knowledge gained or statements made in confidence, it will find a way to make that protection effective by bringing within its scope the testimony of those whose participation in the confidence is reasonably required. It may be that it would be of little worth to forbid the disclosure of information gained by a physician from the examination or consultation of his patient, if the nurse, necessarily present, could reveal it. See *Culver* v. *Union Pacific R. Co., supra; Mississippi Power & Light Co.* v. *Jordan,* 164 Miss. 174. It may plausibly be urged that the privilege of attorney and client would be as often defeated as preserved if it did not draw within its sweep the testimony of clerks in the lawyer's office. See *Sibley* v. *Waffle, supra.*

But it is unnecessary now to determine the latitude which may rightly be given to the privilege which the law confers upon either of these relationships, for no considerations such as those suggested apply to marital communications under conditions disclosed here. Normally husband and wife may conveniently communicate without stenographic aid and the privilege of holding their confidences immune from proof in court may be reasonably enjoyed and preserved without embracing within it the testimony of third persons

to whom such communications have been voluntarily revealed. The uniform ruling that communications between husband and wife, voluntarily made in the presence of their children, old enough to comprehend them, or other members of the family within the intimacy of the family circle, are not privileged, *Linnell* v. *Linnell,* 249 Mass. 51; *Cowser* v. *State,* 70 Tex. Cr. Rep. 265; *Fuller* v. *Fuller,* 100 W. Va. 309, is persuasive that communications like the present, even though made in confidence, are not to be protected. The privilege suppresses relevant testimony and should be allowed only when it is plain that marital confidence can not otherwise reasonably be preserved. Nothing in this case suggests any such necessity.

We do not intimate whether in the present circumstances the wife's testimony, not offered against her husband, would likewise be freed of the restriction. Cf. *Nash* v. *Fidelity-Phenix Fire Ins. Co.,* 106 W. Va. 672.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.